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No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II, PAGES 258 TO 530

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CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1304] DR. RANDALL PRICE

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Can you hear me okay, Sir?

A I can.

Q State your name, please?

A I am Dr. Randall Price.

Q Where do you live, Dr. Price?

A In Dallas.

Q Are you married?

A Yes, I am.

Q Do you have any children?

A I do.

Q How many?

A I have one.

Q What is your occupation, Sir?

A I am a clinical psychologist and neuro-psychologist.

Q Tell me your educational background, if you would?

A I have a Bachelor's Degree and Masters' Degree, and Ph.D. in Psychology from the University of North Texas in Denton, with a clinical internship at the Baylor Institute for Rehabilitation, which [1305] is part of the Baylor School of Medicine in Dallas.

Q What do you mean, a clinical internship at Baylor?

A That is a time period after the completion of the normal academic training, where the individual is asked to engage in practice under strict supervision to – the practical skills that they have learned in the classroom during their formal education.

Q And, what area did you work in, in your internship?

A It was the assessment of brain damage and help rehabilitation of those who had brain impairment.

Q Now, you say that you are a psychologist and a neuro-psychologist. Well, maybe let me ask you a different question first. What have you been doing since that intern-ship?

A I have had a practice in psychology and clinical neuro-psychology in Dallas since 1983. I have also taught classes in Dallas at a college known as Rickland College

and I am now of the faculty at Texas Womens' University, which is in Denton.

Q Now, let me ask you what is psychology?

A In its broadest terms, it is the study of human [1306] behavior, both normal and abnormal.

Q What is neuro-psychology?

A Simply as I can put it, it is the study of the brain as it controls the individual behavior. It is a study of brain functioning.

Q Now, as part of your, I think you mentioned that you did some teaching?

A Yes, Sir.

Q Where do you teach?

A I teach on the faculty at Texas Womens' University, and also, at Rickland College.

Q Have you published articles in clinical psychology and neuro-psychology?

A I have.

Q A lot of them?

A Several.

Q Can you mention one or two of the publications?

A Most current was an article in the Journal of Visual Impairment, that was concerning the neuro-psychological assessment of those that are visually impaired. Prior to that, an article that was an examination of the individual's ability to drive an automobile after having brain injury.

Q Are you licensed to practice psychology in the [1307] State of Texas?

A I am.

Q Are you licensed in any other state?

A I am in the State of Hawaii.

Q Is a psychologist different from a psychiatrist, Sir?

A Yes, it is.

Q Explain the difference, briefly, please?

A A psychiatrist goes to medical school. They have training like any other individual that becomes a medical doctor. Upon completion of medical school, they complete a training time period in internship and residency in psychiatry, which involves the medical treatment of abnormal behavior.

A person who is a psychologist goes to college and then to graduate in psychology which is involving anything concerning the study of human behavior. Then, if they chose a specialty in clinical psychology it involves the diagnosis and treatment of abnormal behavior.

Q You have a Ph.D., I believe you said, right, Sir?

A Yes.

Q Okay. Has a psychologist with a Ph.D., has he gone to school just as many years as a psychiatrist?

[1308] A Approximately, Yes.

Q Who spends more time in school studying human behavior, a psychologist or a psychiatrist?

A Studying human behavior, a psychologist spends more time studying human behavior than does a psychiatrist.

Q You are customarily called a doctor, is that right?

A Yes.

Q In your practice of psychology, specifically what type of work do you mostly do?

A The practice that I have primarily done, consists of conducting psychological evaluation, and frequently in my practice, it is involving individuals who have come in contact with, in some way, with the legal system, either criminal or civil.

Q Have you testified in court a number of times, Sir?

A I have.

Q Have you testified both in criminal and civil cases?

A I have.

Q And, in criminal cases, have you testified for both the Defense and the Prosecution?

[1309] A Yes, I have.

Q Is that also true of capital murder cases that you testified for both the Defense and the Prosecution?

A Yes, that is true.

Q Are you an opponent of capital punishment under all circumstances?

A No, I am not.

Q Dr. Price, as a psychologist who has worked in criminal cases, is the issue of faking by a criminal defendant a significant one to you?

A Yes, it is, a very significant issue, and any time a psychological examination is done by a person who has something to gain from looking bad, then, the issue of the possibility of faking becomes very relevant in the evaluation procedure.

Q Have you done any work on how to tell whether a person is faking on a psychological test?

A Yes, I have. That has been some interest of mine, since 1985 or 1986, and I have conducted a seminar in the psychological assessment for faking in several states and Texas, and Florida and California in the State of Pennsylvania, to hundreds of psychologists in trying to atune [1310] them to the fact that it is common for someone to have a tendency to fake, and how it is effected.

Q Have you done any work for – in that area for anybody working at TDC, the Texas Department of Corrections?

A Yes, I have. Last, it was in the month of December of '89, I taught a portion, on this very campus, to all of the psychologists that are employed by the Texas Department of Corrections, in how to assess for faking.

Q Now, you have examined Johnny Paul Penry, haven't you, Sir?

A I have.

Q When did you do that?

A On three occasions, on the 20th of April, 1990; on the 8th of May, and on the 13th of June, all in 1990.

Q And, if you add up the time that you spent with him, on all three occasions, how long did you spend?

A Approximately eleven hours.

Q Now, in your first session on April 20th, what did you do?

A In the first session, I conducted a clinical interview and history, tried to find out some [1311] things about his background, what kind of a person he was, and make some observations of his behavior, especially, and then, planned what type of evaluations I would have to conduct on the subsequent visits.

Q And, then, you visited him again on May 8th?

A On the 8th of May, Yes, Sir, that's correct.

Q What did you do on May 8th?

A On the 8th of May, I conducted the Halstead/Raycon Neuro-Psychological Test Battery, which is a test.

Q What kind of test? What is the purpose for that battery of test?

A The purpose of the battery of test is to determine if there is brain impairment.

Q And, can you just describe that battery of test briefly to the jury?

A Yes. There are ten different tests that attempt to measure and quantify an objective way all the functions

of the brain that are – those that are easily quantified, anyway, that would represent a range of behavior controlled by different areas of the brain, anything from simple things like how fast a person can pass a little apparatus account staff, to how hard they can [1312] squeeze an apparatus with each side of their body, in each hand, to those that are non-verbal kinds of examination procedures. They don't have to have any education for it, it is something that anybody can test them to see, how their brain is functioning, and other test that would test abstract thinking and higher though processes that are somewhat more involved in the frontal area of the brain.

So, the idea of the examination is to assess a wide range of behavior that the brain controls, so that you can see how the person's brain is functioning through their behavior.

Q Is that the Halstead/Raycon Battery of tests?

A Yes, that's correct.

Q And, is that widely accepted in the scientific community as a valid indicator of brain damage?

A Yes, Sir, the most widely accepted battery of tests in the field of neuro-psychology, and it has been used since the 1940's in studies and in clinical examinations.

Q How does scientist know, Sir, if you do poorly on any test, that means, that something is wrong with your brain?

A Well, they – if – it was in the hospital right [1313] after the war, they were able to tests a lot of soldiers coming back from the war, who were known to have a

brain injury. At that time, in the field they were able to keep them alive a lot longer than they had in previous times, when they would send soldiers to war, and also, the kind of ammunition that they would use would – it was not like the kind that they had that explodes and tumbles and things, now, so, it would actually create a smaller hole in the brain, if you will. The person would live, and they would after that would test them with a wide battery of test and see what they couldn't do that people who didn't have that injury could do. They were also able to validate a lot of the testing procedures by having an autopsy after the person had already previously had the test and then, perhaps it was in the condition – it was a medical condition, a tumor, – disease, and they were able to correlate the test finding and the examiner's finding on autopsy of the integrity of their brain.

Q How long did it take you to give the Halstead/Raycon Battery of tests to Mr. Penry?

A Approximately four hours.

[1314] Q How many separate test were there?

A I gave nine of the ten.

Q And, you gave him nine, and there are ten in all?

A Yes, Sir, there is a test that I did not give.

Q Tell me a few examples of the sort of things that you asked him to do?

A Well, like I said, there was a finger tapping test, hand strength, and there is other test where you have him draw things, copy them, see if they can see it, and also, to reproduce it on paper. Some of the problem solving that

they have to do, in essence, learn something right in front of you. It would be a task that they have never seen before so that you can see not what their educational experiences are but, how they would learn something that they couldn't have possibly seen before.

There are other tests that were solving puzzles of different kinds, so, you can see how they solved problems irrespective of their language ability.

Q Do the test reflect any significant degree of reading and writing skills?

A There is part of the battery, the Efasia Screening [1315] Exam that does also test for both the expressive and the receptive aspects of language. The other test is relatively language and education free.

Q The language is important in only one of the nine test that you gave him?

A In the Halstead Battery, Yes, Sir, that's correct.

Q Do you have something that you can use to show the jury, what one of the test that you gave Mr. Penry was?

A I do.

Q If His Honor, will permit I will ask you to step down here and move that table over. I will have to take that table away from you. I'm sorry.

What is that in that box that you are bringing out?

A This is a test that is known as a tapping performance test. This is an excellent test for the test of brain impairment, in that, it is a test that seems relatively

simple in that, that it is a puzzle form, that they have to identify various shapes and put them into the appropriate spaces on the board. Although, it is a little bit different, because we first [1316] blindfold the individual so that this is a type of a task that they have not experienced before, to use the blindfold, and you have the blindfold in place before the exam. You have the blocks in front of them and you ask them to complete this and you show him by the use of your hand the size and shape of the board and you then, ask them first to complete this exam just using their – in his case, the hand that is the dominant hand, he is right handed, so, you first, have them try to complete this with their right hand. If the idea here is that the right side of the body is controlled by the left half of the brain, conta-laterally, is what they call it, you can get an idea, of the functioning of the left hemisphere of the brain. After that, you tandom, you tell them, and explain to them that as fast as they can do it, encourage them as they are in the process of taking the test, and you time them to completion. If, while they are in the process of taking the test, a block falls out that they have put in, in the right spot, if they have already done so, then, after they finish with the right hand and this is what I also ask of Johnny Penry, I then [1317] ask him without taking the blindfold off, to complete the test with their left hand and then after they complete that, also, timed, you then have them use both hands and then, after that third trial, you put the board up, you take the blindfold off, you hand them a slip of paper and you saw draw the board, draw as many of the blocks as you can, try to put them in the right place, if you can. You have a task here also, that would test memory, which is obviously, also a test of the

brain, an accurate examination procedure for the detection of brain impairment.

There are some of the studies that indicate that this is up to ninety, ninety-five percent accurate, and you also, get an idea of a comparison of both the right and the left hemisphere of their brain.

Q I ask you, Dr. Price, how well is a non-brain impaired person expected to do on that test?

A On the first trial that would involve the dominant hand, an individual without brain impairment can complete that in under about seven or eight minutes. Sometimes, lets say, the range is probably about half of that with a person without any type of brain impairment.

[1318] On the second trial, you expect it to be cut in approximately half, or that you would at least expect thirty to forty percent less time on the second trial, and if they have learned something, it should be transferred from one hemisphere to the other, and should be about four minutes at the most on the second trial.

At the third trial involving – so that they could use both their right and the left hand, it should even – they should be able to complete that even quicker. Well, usually, then, it goes down to a couple of minutes to complete that.

Q How long did Johnny Paul Penry take to complete it?

A On the first trial, he took approximately eleven minutes, which is in the brain impaired range as a score. It should be eight or less. On the second trial, that you would expect it to have a completion time that is alot

quicker and his was actually more, the second trial, it took him fourteen and a half minutes to complete.

On the third trial, he was able to then, experience some transfer and come back in again with the right hand again, and took him four minutes. [1319] So, it was a total of twenty-nine and a half, for the total time that it took him to complete the task.

Q What is the most that you say someone that is not brain impaired?

A The total time should be about fourteen minutes. So, it took him about twice as long as a person without brain impairment to complete the task.

Q Did you consider the possibility that he was just faking?

A Sure.

Q Do you have an opinion as to whether he was faking?

A I do.

Q What is that opinion?

A That Mr. Penry, that he was not faking on this particular test. On this particular test, if a person is trying to fake part of it, they will often times, they will just stop and say they can't do it, take off the blindfold, sometimes themselves, and they will certainly have time, in other words, that they just don't do, anything. He continually tried to complete the task. Actually, he became like alot of [1320] people that I have had the chance to examine, I really became sort of caught up in this, and wanted to do

as well as he could. Usually, individuals, whether they are in contact with the legal system or not, on tests like this, they can get caught up in trying to finish it, if for no other, at times, they want to finish it so that they can get it over with, because this is a frustrating task for them. He continually tried, even though his strategy was very ineffective and he would try at times to continue to put a block in a space that didn't fit, he would keep trying the same task. He would approach it in a random fashion, instead of a strategy but, those who fake, usually just slow down and do not do anything. He did not do that on this task.

Q Why don't you put that away and get back to the witness stand?

A Right.

Q Okay. On the whole battery of test, Doctor, do you have an opinion as to whether Johnny Penry was faking?

A I do.

Q What is that opinion?

[1321] A It is my opinion that he was not faking that the examination was a valid one.

Q What is the basis for that opinion?

A Well, there are actually three or four things to look for to assess the possibility that the person is trying to in fact fake, and that in all of those cases, the three areas that I would look for in this type of examination, first, is to look at the record to see if there is some examinations that were conducted at some time that the

person was not in contact with the legal system, so that they didn't have anything to gain from faking. That was the case with Johnny Paul Penry, there were examinations in the record from the age of nine that had suggestions that they thought there was brain damage or brain impairment, or that they come out with a strong opinion and some evidence that would indicate even that at an early age that there was brain impairment.

So, I was – I would first look at the report, the, and the second thing that I would observe, their behavior, that is why I like to do the testing myself, so, I can watch them, and like I described on the performance exam, that [1322] frequently those that are faking, they stop trying, they are uncooperative, and they are fairly obvious in their attempt to not attempt to put forth their best effort. That was not the case with Johnny Paul Penry. He tended to respond to encouragement, actually he didn't like to do poorly on the test that he did poorly on, he wanted feedback, if he did well or not, and that is the observations that I had, was that he was giving forth effort on the test.

It is a third area and I think that it is the most important in examination for faking, is that any time that somebody is going to fake a disorder they fake what they think the disorder ought to be like. Now, frequently the thing is, is if they don't know exactly so they have a perception of what a person, as an example with brain impairment, what they would be like on the test, and that is what they try to fake. Usually in so doing, they have a test performance that is inconsistent, in other words, on some of the test that starts out with easy items and then goes to harder items, some of them go back and forth,

they tend to keep the consistency that an individual with valid brain impairments [1323] has sometimes they get the easy items wrong and they end up with something that is harder, they end up having it as a correct performance. They also sometimes will score high on a certain test and then, as it so happens, we have another test in the battery that measures the same kind of ability, the same brain functioning, and so, then, they will score low on that one because they are inconsistent. That is the important thing to look for in terms of assessing faking.

In the case of Johnny Paul Penry, he didn't do any of those, he was consistent, easy items right, hard items wrong, on test that would measure similar functions, he scored it at about the same level.

Also, there is some research that shows that those that are trying to fake brain impairment, they have certain things that they think that they should fake. Usually, it is a sensory and motor ability. Their hearing, their vision, if they can feel things that you write on the back of their hand, or touch each hand with their eyes closed, or in finger tapping, they will do that slowly, and it is those things, because they thing that a brain [1324] impairment is being that the person at least is clumsy, or slow to move or uncoordinated, eye hand coordination, and those are the tests that they do poorest on, those that are faking tend to do their best on finger tapping, strength of grip, the conceptual examination, and speech sound perception, those the brain impaired that shows the best test, that he does the best on, indicates mild to moderate brain impairment, and only if there is very severe, usually, fairly current brain impairment, they are going to do poorly on those tests, and instead, those that

have had a brain impairment for some time, tend to do the poorest on, a certain set of test, the category test and also tracking performance test, and those are the ones that Johnny Paul Penry did the poorest on.

Q How did he do on the finger tapping, things like that?

A Well, it was a sensory perceptual exam, was the only testing procedure that he scored in the area that would be in the range of normality.

Q What is that? What test is that in hearing and things like that?

A Yeah, on the finger tapping, he scored in the [1325] impaired area, but, just barely. So, those he did fairly – those were his highest scores, and those are what people usually fake. The final procedure, sometimes, we can use some specialized kind of technics in an attempt to give them an opportunity to fake and see if they will do it.

Q Do you have something there you can demonstrate?

A Yes, I do.

BY MR SMITH:

I think, maybe just for the record, I am going to ask the court reporter to mark it for identification if I may.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT THIRTEEN WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Okay. What is Exhibit Thirteen for identification Dr. Price?

A It is a thirteen item test. This is an interesting procedure that you give the person an opportunity to fake. Give instructions, you say, now, the next test is a somewhat complicated test, I am going to show you fifteen different items, and [1326] I am going to show you this for ten seconds, and I want you to, after I have taken it away, I want you to try and remember as many of them as you can, and then, you show them the test for the ten seconds, you count the ten seconds and they at times can study it, sometimes, you hand it to them and you allow them to study this test and you say it is a complicated test, only ten seconds, and after that, you take it away. Well, actually, it is an easy test and that if this person is not severely brain impaired so that they would have some paralyzed or severe speech problem or something that anybody could tell, they would have to be very, very impaired to not get at least nine of the fifteen and if they get nine or less, we really suspect that they are trying to do poorly on purpose, they are trying to fake. So, this is an interesting test.

Q Did you use it on Johnny Paul Penry?

A I did.

Q How many did he get right?

A He had twelve of the fifteen, so, it shows to me, that he was trying and not trying to fake that particular test.

[1327] Q Now, Sir, can you summarize the results of the Halstead/Raycon Test, the whole battery of tests that you give him at this time?

A I can. I gave, out of the ten, I gave nine out of the test in the battery. He scored in the brain impaired area, in all, save one, that was the sensory perceptual examination, all of the other test, the brain function, he scored in the area is associated with those that a brain impairment.

Q As a result of that, do you have an opinion as to whether his brain is or is not impaired?

A I do, yes.

Q What is that opinion?

A That he clearly has a case of brain impairment.

Q Now, apart from your own observations, I think you mentioned a few minutes ago, that you reviewed the records. Have you reviewed any records that relate to your finding of whether Johnny Paul Penry suffers from brain impairment?

A I did.

Q And, let me show you Defendant's Exhibit Six. I am going to put it before you, and I am going to put before you a copy of a document that has been marked and received in evidence as Defendant's [1328] Exhibit Six.

Is that one of the documents that you reviewed?

A Yes, Sir, it is.

Q And, you see the line that begins, "Impression" there?

A I do.

Q First of all, when was that test given? When was that report done on Johnny Penry?

A August 25, 1965.

Q You know how old he was then?

A He would be nine years old, then.

Q And, what was the examination, or the psychologist's impression recorded in that test?

A The impression was that he had diagnostic impression of mental retardation, with a significant degree of organicity.

Q What does the organicity mean to you?

A That is an older term for brain impairment.

Q Let me show you a copy of Defendant's Exhibit Three, which is already in evidence. Is that one of the documents that you reviewed?

A Yes, it is.

Q And, is there anything in there that you regard as indicating brain impairment?

[1329] A Yes, that the examiner on the test that is known as the Bender Gestalt.

Q I'm sorry to interrupt, but, when was that test taken?

A The report was written on January 23, 1973.

Q So, how old was Johnny then?

A He would be seventeen.

Q Okay. I'm sorry. Go ahead.

A There was a part of the examination that was given, and just an educational examination in the school system, in Goose Creek Independent School District. They gave him the test known as the Bender Gestalt, which is a test where you present different kinds of drawings or figures and you ask them to copy it. So, it requires some eye-hand co-ordination, it is not a drawing test, but, the person without brain impairment can make the figures look like the figures on the – . There are some certain things that people who have brain impairment tend to do, and those are noted here, that he did at that time, that they were distorted, that they didn't look like the figures, they were over-lapping, drew them on top of each other, and there were also, [1330] the crowding of trying to draw them too close together. Those are not the kind of things that people without brain impairment typically do on the Bender Gestalt, especially at the age of seventeen.

Q Okay. Now, for quite a while, I am asking to go to the Halstead/Raycon Test, that was the second of the three sessions with Mr. Penry, right?

A That's correct.

Q What did you do the third time? I think you said, was sometime in June, June 13th?

A June 13th. I at that time, administered an IQ test, which is the Wechsler Adult Intelligence Test, and at that

time it was revised, referred to as the Wechsler Intelligence Adult Test, revised, and that is the test that I gave him at that time.

Q And, how did he score?

A Well, it has three IQ scores that are intended to give us an indication about, again, not only their brain, but, also their experiences with education, what they have learned, not how they have learned, but, how they have learned that typically, is shown in the verbal IQ, which [1331] his was 63, was the IQ that I obtained at that time.

There is a performance IQ, that is the type that typically is not so influenced by their educational experiences, and instead more eye-hand coordination, nonverbal kinds of things, and his IQ in that area is 66.

And, the full scale IQ, when combined all of the different sub-test and compare the person of those of the same age group, his was a 63, on the full scale IQ.

Q And, what do those scores indicate to you about Mr. Penry's intelligence?

A That he is mentally retarded.

Q Mentally retarded, something different from brain impaired, Doctor?

A It is a symptom of brain impairment. That there is a lot of possibilities for causes of mental retardation and that in those causes, the predominant one is in fact, is brain impairment, and so, that it is a symptom of the underlying brain impairment.

Q So, you are saying that, putting it this way, are there some people that are mentally retarded, for some other reason other than brain damage?

[1332] A That is what we think. Sometimes people say that we just don't know how to assess it, or some other problem is there, but, there is a significant portion of those with IQ's below 70, that there is no known biological cause of their IQ or their mental retardation.

Q Are there also many people with brain impairment that caused the mental retardation?

A That's correct.

Q Is Johnny Penry one of those that the mental retardation is caused by brain impairment?

A I think it is a substantial part of the cause I think it is hard to separate the cultural education aspect, but, certainly in this case, the underlying brain impairment is a big part of his mental retardation.

Q Dr. Price, have you reviewed the scores of Johnny Penry's previous IQ tests taken throughout his life?

A I have.

Q Are they consistent or inconsistent with the results that you got on your IQ tests?

A They are largely consistent. I find that there is nothing in the files that I have seen with regard to previous examinations on IQ scores [1333] that is consistent with the present finding.

Q Can you explain why you find that in July, '66?

A Well, there are certainly scores in the record that are not the same as the score that I obtained, and lots of reasons why IQ scores for an individual who has several times of taking the test, lots of reasons why they can be somewhat different.

A part of it is that it is strictly because of the fact that the tests aren't perfect, there is a measurement area that we talk about as being that there is a plus or minus five or six points that you have to add to and subtract from any finding, because of just the error involved in the test.

Also, sometimes there is an error on the part of the examiner, especially, and this happened on at least two of the examinations that I saw in the record or Johnny Paul Penry and that is that they didn't give the whole test there were two of the times that the score was most – from the scores that I obtained, and close examination of the file indicated that they didn't give all of the test. It was like that they asked him to run a mile and they stop him half way through and multiplied times two. They [1334] simply didn't give the whole test, and they estimate the parts that they didn't give.

Also, like anybody to take these tests, we all have our good days and bad days, in terms of thinking, memory, concentration problem-solving. The problem here is that at the lower level of intelligence, and on the IQ test there is not as many items as there are hard items, so, a person with a low intelligence has a bad day and does poorly it affects their scores more, because not as many items attempting to measure that particular function. There are times when, if they take a lot of IQ tests in a short period, especially the same one or similar, the two or three that

we use, there is a practice effect like a puzzle that you put together, after you figure that it is an elephant, after you see that again, it is easier to complete the puzzle. So, you have the practice effect.

Also, the person can improve, they can have experiences, especially with verbal abilities, that they can get better, they can learn they can acquire information, increase their vocabulary and score higher on some of the tests, [1335] because they done better. So, I don't see anything in any of the records that I have reviewed that I can't explain the differences on the combination of those ideal factors that can influence a person's IQ scores.

Q Would it be correct to say, Doctor, that as a guide, every score above 70 in a competent IQ test, is a sign that he is not mentally retarded?

A No, that would be totally incorrect.

Q Is that a totally unscientific opinion in your view?

A Yes. Even if you take the idea of the fact that there is error involved in them, and adding two to five points are subtracting it, that is often times going to create a – interval and instead of actually sitting and paying particular attention to one score, usually the trained clinical psychologist will talk about a range of scores that he can be confident that this person's intellectual functioning falls within.

Q Now, Dr. Price, you said, that the mental retardation appeared to be caused in substantial part by brain impairment. Are you able to say [1336] what causes the kind of brain damage you found in Mr. Penry?

A I don't know for sure, I don't.

Q Can you tell me some possible causes?

A A lot of things that can cause brain impairment. It is likely that in this case and others, actually if it is mental retardation, that usually happens early in life. It could be in pregnancy it could be that there was a lack of proper diet, poor care, exposure to alcohol, or other substances that can cross the placenta and effect the developing fetus. Could be something happen in the birth process. Only a short time period of lack of supply in terms of blood supply, it would go to the infant's brain that carries oxygen. If there is a time period that that is going to be stopped, that can cause some brain impairment. It also could be an accident or a head trauma that could happen early in childhood, either like a car accident or a serious head trauma.

Q What does head trauma mean?

A It is a head injury, where the person hits their head or something else strikes their head. Could be something that happened that was a single [1337] event, or it could be especially in childhood a series of rather mild bead traumas, that in time, a person especially a child strikes their head, or if they have something hit on their head, and it causes like a mild concussion, that at times, doesn't cause any permanent impairment, but, if the situation happens over and over, especially if there is a child, the brain doesn't have time to recover, and having a series of head traumas can also cause some brain impairment. All of those are possibilities.

Q Dr. Price, is brain impairment, the kind you found in Johnny Paul Penry, known to ever be related to criminal conduct?

A It is.

Q Explain the relationship.

A Well, it is indirect. It doesn't, of course, directly cause criminal behavior, but, brain impairment of this type, causes the person problems in areas such as the individual, if they can control themselves, impulse control, with these things, about tolerance, it decreases that. It effects their judgment and their ability to reason. The ability to make smart decisions for themselves, and others and in [1338] general, the brain impairment can cause a certain degree of instability behavior, and indirectly, those things are some of the very things that are involved in some criminal activities.

Q Are you saying that someone whose brain is impaired, is not to blame if they commit a crime?

A No, I am not saying that at all, but, I am saying that you can't blame Johnny Paul Penry for having brain damage.

BY MR. SMITH:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q You can't blame Johnny Paul Penry for having brain damage is that what you said?

A Yes, Sir.

Q That doesn't mean that we can't blame him for capital murder, though, does it, Doctor?

A No, Sir.

Q Or rape?

A No, it doesn't mean that.

Q What type of records have you reviewed of Mr. Penry?

A The previous psychological and psychiatric evaluation, as well as these two or three that [1339] came from schools that he was enrolled in, in both in public schools and when he was at the Mexia State School.

Q Are you telling this jury that you just reviewed certain, selected items of his records?

A I reviewed those that were pertaining to psychological testing.

Q You didn't review all of these mental health records?

A Well, I reviewed those that were involved in an evaluation, not those that were involved in treatment.

Q Why?

A That was the source of information that would be the most valuable to someone that is conducting a psychological or neuro-psychological evaluation, because there is some objective findings there that I would like to look at, when I do this kind of an examination, so I can get some point of comparison.

Q Okay. Did you review his records from the UTMB in Galveston, University of Texas Medical Branch in Galveston, back in 1965?

A There was a report and a letter from that time period that – at the University of Texas Medical [1340] Branch in Galveston that I saw.

Q A report and a letter?

A Right.

Q That all you saw?

A There was a psychological report that was dated August 25, 1965, and there was a letter to the Austin State School that was done on May 2, 1966. Those were the two things that I reviewed.

Q Two documents from the UTMB. You know what I am talking about, don't you?

A Yes, Sir.

BY MR. PRICE:

Do you mind giving me that exhibit from the Competency Trial, UTMB?

Q Who furnished you those records, those two documents that you talked about out of the University of Texas Medical Branch out of Galveston?

A Those were furnished to me by the attorneys of Johnny Paul Penry.

Q Were you brought into this case by the attorneys for Johnny Paul Penry?

A That's correct.

Q Back in April?

A Well, it was – the first time that I discussed [1341] the case was in April, and then, it was on the 25th of

April, was the first time that I conducted any part of the evaluation procedure.

Q When was the first time that I was actually involved in this case or contacted.

A It was early in April of this year.

Q About when?

A I believe it was about the ninth or tenth of April, something like that. I'm not certain.

Q And, the attorneys furnished you with certain records, I take it?

A Yes, Sir, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-ONE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I am going to show you what has been marked as State's Exhibit Number Ninety-One, and were all of those documents there previously been represented, I believe to be his record, from the University of Texas Medical Branch in Galveston. What were you furnished?

A Here is a letter to the Austin State School, was the first letter, other than a letter from the attorney at the time that is dated May 2, 1966. [1342] I was furnished that document. This looks like a questionnaire to the school system

Q Were you furnished that?

A No, I had not seen that or if I did, it is not in my file.

Q Let me direct – what you are talking about, going back to that, please.

A Yes.

Q See if I can – you see this line right here – would you read that?

A Yes. It says, the school has him down as retarded, but, the test show that he was just slow with a question mark after it.

Q "School has him down as retarded, but, the test show that he was just slow?" You weren't shown that document?

A I think it was referred to in another letter from the principal.

Q Okay. Just get your records out, what you were furnished with, and then, we will know.

A 5/04/65. I did not see this. That looks like a referral sheet that was going to UTMB.

Q Why don't you get out what you were furnished?

A I had it right here.

Q Get out the UTMB. Where is it?

[1343] A (Indicating) Here is the psychological August 25, 1965.

Q Were you furnished this document that you just read, that says that the school has him down as retarded?

BY MR. SMITH:

Object to reading the document that is not in evidence, and the witness has never seen.

BY MR. PRICE:

I am just asking. I can ask if he was furnished that document.

BY THE COURT:

Yes, Sir. Overrule the objection.

Q Were you furnished that document?

A I never seen that document.

Q Didn't you just say that it was referred in something? Would you mind showing me what it was referred to?

A I believe it was a letter that came from the principal, but, it was before that, so, that was not referred to, if it was in 1963, it was a letter from a principal that I saw. I don't have a copy of it.

Q Where is that letter that you saw?

[1344] A I was shown this when I was looking at the file, and this was not something that had any scores or anything objective in it, to me, so, –

Q I take it that you were shown more documents than what you have brought in here to Court today, and you picked out the ones that you thought were relevant is that right?

A There were trial transcripts that I did not think, –

Q I'm talking about his medical, mental health records.

A Oh.

Q That is what we were talking about, wasn't it?

A Yes.

Q Were you shown some other documents that you haven't brought here with you today?

A Only the letter from the principal in 1963. The other ones I was shown, I have copies of right here.

Q Is that the only document that you were shown that you didn't bring with you today?

A I didn't copy it, no.

Q Okay. Were you shown any of these records?

A I have no –

[1345] Q This is a document dated May 2, 1966.

A Yes.

Q Okay. You have that and you have the one, well –

A That's the same one.

Q Were you shown any of these? Were you shown this closing summary?

A The progress reports wasn't – I asked for at my request, what I asked for is any of the records that had scores, any of the records that had something objective that I could compare my findings to.

Q Were you furnished records from other facilities also that he was either in or tested by?

A Yes.

Q Over the years? Specifically were you given records from the Goose Creek Independent School District?

A Yes, I was, and a report that was dated 1/23/73.

Q Where are those documents that you were furnished from Goose Creek?

A Right here.

Q Okay.

A There is an educational prescription – education prescription dated 6/10/71. There is an appraisal report that is dated 1/23/73.

[1346] Q Okay. I want to jump back to that, UTMB record just a little bit. You were shown the psychological report dated August 25, 1965, is that right, showed his test, IQ test?

A Yes, I was.

Q That showed a verbal IQ of what?

A The verbal IQ was 72.

Q What does a verbal IQ measure?

A That is part of the intelligence that is involved with language, either the ability to understand it when it is spoken to you, or to give answers that are answers that require the use of language, that require the use of words and answers that primarily have the person's educational experience and background.

Q Did you review that, that August, 1965?

A I have.

Q Were they all there, or was that one of those that they just guessed at?

A It was one that they did not complete the test, they didn't give the vocabulary sub-test, the verbal IQ part of it, and that, although, that test that takes a little time to give, is one of the better ones, in assessing the person's verbal IQ, so, they skipped that one, and then, [1347] they had to estimate it, or to calculate the IQ without that part of the sub-test.

Q So, that test wouldn't particularly be that accurate is that what you are saying?

A I think the fact that they did not follow standard procedures and they left out parts of the test, would tend to decrease its accuracy in my opinion.

Q Were the tests furnished to you, the IQ tests?

A The answer sheet was.

Q Okay. Could I see that, please?

A (Witness handing)

Q Can you tell whether that test was an accurate assessment of his mental capacity at that time?

A That test, or referring –

Q The one given to him.

A The one –

Q 1975, the full scale, the whole –

A I think it is an estimate of his intellectual functioning, at that time.

Q Okay. So, you don't disagree with the results of it?

A I don't disagree. I think we could have gotten a better picture had they given the whole test, [1348] but, it is an estimate of his ability at that time. I would consider it accurate.

Q Were you furnished his records from Austin State Hospital and Rusk State Hospital?

A Austin State Hospital, September 13, 1973, psychological evaluation. Austin State Hospital September 17, 1973, that was the in-take; and at Rusk, a psychological evaluation that was conducted on October 23rd, 1973.

Q But, you weren't furnished all of his records from these two institutions?

A I received the psychological evaluations, which is what I asked for.

Q We managed to lose Austin State records, but, I am going to – what was it that you – get the UTMB records out again.

A There is the letter to the Austin State School from UTMB.

Q Okay.

A Now, did you want the Austin State Hospital?

Q Yes.

A Austin State Hospital, psychological evaluation and the admission note from Austin State Hospital.

Q Okay. That is all that you were furnished from, Austin State Hospital?

[1349] A That's all I asked for, was the psychological evaluation.

Q Any reason to just limit yourself to that?

A It is most useful to me in terms of the fact that it is objective findings if there was any testing done.

Q Is the fact that those records may have shown other things, such as anti-social personality, anti-social behavior, would that be important to you in assessing this Defendant's mental status?

A It would be important in understanding the whole, try to explain or understand the whole person and there are such references in terms of doing a neuro-psychological, the most helpful to me is those things that are objective that are scores like I can look at.

Q You limited yourself to neuro-psychological? You are not trying to tell this jury that you are going to give them a picture of the person here, is that what you are saying?

A I asked for records that were psychological evaluations because from having looked at a lot of records, the treatment notes, and half the time you can't read them, they are not that [1350] valuable to me. I asked for what I thought would be the most important to me, whether it pertains to brain functioning or anti-social behavior, all of that is important to look at I think.

Q But, you didn't look at the rest of it?

A I looked at the psychological evaluations. If they had scores in them, I looked at that. If they had reference

to anti-social behavior, I looked at that. Anything in the psychological evaluation.

Q Did you see the Austin State Hospital records, any references to anti-social behavior?

A In the psychological report, there were no impressions given, and it is primarily concerning the scores and the psychological functioning does state that there was adjustment reaction of adolescence, and the admissions note, there was no direct reference to anti-social tendency in the impressions or the diagnosis from Austin State Hospital.

Q Did you see a history that was given in Harris County, that became part of his Austin State Hospital's records?

A Is that in the letter? I mean, is that part of the psychological, or part of the admissions note?

[1351] Q This document here, about four pages.

A That is a referral sheet. I don't recall seeing this, no.

Q Okay. You wouldn't disagree that, that is part of his Austin State Hospital records though, would you?

A No.

Q But, you weren't furnished that, were you?

A I asked for the psychological evaluation and the questionnaire that is filled out on intake.

Q Were you furnished his TDC records?

A No.

Q None?

A No.

Q Are you sure about that?

A Well, I didn't see his file from TDC, no.

Q You didn't see any of his files from TDC?

A No.

Q Okay. None of his mental health records from TDC?

A There was a psychological evaluation done at TDC.

Q Okay. Let me see that.

A Handing) Okay. Here is a psychiatric evaluation done at Diagnostic Center of TDC.

[1352] Q How many documents were you furnished concerning his TDC records?

A This psychiatric evaluation, and also, a neuro-psychiatric evaluation. Two.

Q Would you take those out? Could I see them, please? These records that I am holding in my hand now, are the only ones that you were furnished from the TDC records?

A It is the only ones that I asked for to review, the evaluations are the only ones that I have.

Q That wasn't my question.

A I have not seen other evaluations reports other than that.

Q You wouldn't play games with us, Doctor, or with this jury, about something this serious would you?

A No, Sir.

Q Do you know a Dr. Mount?

A George Mount?

Q George Mount.

A Yes I do.

Q A psychologist from Dallas?

A Yes.

Q You know that he came down and testified previously in an earlier proceeding in this matter?

[1353] A Yes.

Q He brought a stack of TDC records just about this high. Do you know that?

A No, I didn't know that.

Q Do you know that he testified that he got them from you?

A No, I didn't know that he testified to that.

Q Are you saying that he did not get those records from you?

A I did not review the TDC file.

Q Were you furnished the TDC file, Doctor?

A The TDC that I recall receiving was, that I looked at to formulate my opinion, were the psychological evaluation in terms of disciplinary reports, and if I had those, I passed them along.

Q Talking about mental health records from TDC, ten years worth?

A I did not review those.

Q Did you ever have them in your office?

A If I did, I passed them on to him, and didn't use them for my report.

Q Okay. If he came in this courtroom and testified right where you are sitting under oath that he got those from you, you are not saying that he is wrong, are you?

[1354] A No, I just didn't review them.

Q You just decided that it would be best that you not look at those so you couldn't come into this Court and not be cross examined on them, didn't you?

A That is not what I decided to look at.

Q Its not?

REPORTER'S NOTE: WHEREUPON STATE'S EXHIBITS NINETY-TWO, NINETY-THREE, NINETY-FOUR, NINETY-FIVE, NINETY-FIVE (A), AND NINETY-FIVE (B) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I show you what has been marked as State's Exhibits Ninety-Two, Ninety-Three and Ninety-Four, is that the TDC records that you are telling this jury that you relied upon?

A That's correct.

Q I want to show you State's Exhibits Ninety-Five, Ninety-Five (A) and Ninety-Five (B), and were those – I am going to ask you about these records now. Were those furnished to you sent to your office?

A If I did –

[1355] Q By Defense Counsel?

A If I did, I don't remember those records, No, Sir.

Q You don't remember them?,

A No, Sir.

Q You remember getting a stack of records?

A In previous transcripts, and I did not review them for my evaluation.

Q Why not?

A I wanted to only to look at things that had scores that were objective findings to compare to what I found on testing.

Q But, they were furnished to you?

A I didn't review them and I don't remember if those were exactly the records that were the records that were furnished to me.

Q I see. But, if Dr. – what was his name again?

A George Mount.

Q He is a friend of yours up in Dallas, isn't he?

A Yes.

Q You sent him down here didn't you, before, to testify?

A I didn't send him down here.

Q You didn't have anything to do with recruiting him?

[1356] A I referred the attorneys to him.

Q Right.

A Yeah.

Q If he came in here in this courtroom and was sitting where you are sitting under oath and said, that this stack that is represented by State's Exhibit Ninety-Five here of the TDC records, that he got them from your office, would you dispute that?

A No.

Q You are just telling this jury that you did not look at those records?

A That's right. I did not look at those records or the records he obtained from me.

Q You just selected what you wanted to look at basically is what is amounted to, didn't you, Doctor?

A The psychological evaluations, Yes, Sir.

Q Yes, Sir, and if these records, State's Exhibit Number Ninety-Five contained ten years worth of mental health history-on this Defendant, ten years worth of meeting with psychologists on a regular basis, of seeing psychiatrists on a regular basis, numerous diagnoses, in there, you don't feel like that the information contained [1357] in State's Exhibit Number Ninety-Five is important to your evaluation?

A Those that have scores, the things that I like to look at that I can compare, then, I have something to compare to, that is the only –

Q All that is important here, all you are saying is important is numbers, you are telling this jury, 73, 62, whatever, that is important, that is what this man is, he is mentally impaired, and all of these records don't even mean anything?

A I don't remember saying that, Counsel.

Q Well, if you look through those records and you saw this Defendant's words all through them, whether he is talking to a psychologist, where he is talking about knowing about his case, and where he is talking about he understands the status of his case –

BY MR. SMITH:

Objection, reciting contents of documents not in evidence.

BY MR. PRICE:

Maybe we ought to let the doctor have some time to study these records.

Q You think it might help you?

[1358] A I don't think it would change my opinion about the examination that I conducted.

Q Do you think it might have some effect if those records indicated that he was a socio-path, a psycho-path?

A No, it wouldn't change the results of my examination, no.

Q Okay. Would that have something to do with the propensity to commit crimes?

A If he was a psycho-path or socio-path, overtures of personality disorders.

Q Right.

A Yes, that is an important part of the history of the individual that we would want to consider, sure. It is not – I didn't say these were not important. That would be an important part.

Q And, if those records throughout diagnosed him not only diagnosed him as a socio-path –

BY MR. SMITH:

Objection to the contents of the records, stating the contents of the records not in evidence before the jury.

BY MR. PRICE:

[1359] I can question him about something that he didn't even think was important to look at.

BY THE COURT:

Overrule the objection. Did you finish your question, Counsel?

BY MR. PRICE:

Not quite.

Q If those records contained diagnoses, numerous diagnoses, of him being a psycho-path, and also a wealth of information about where he had met with psychologists and psychiatrists that demonstrated and backed up those diagnoses, do you think that might be important?

A Important, and not inconsistent with my findings.

Q If you came in here and you are telling this jury that he is mentally retarded, and I believe if I am correct, that would be right towards the end of your testimony a while ago, that he was mentally retarded and that, that could be a contributing cause to the criminal acts, is that right?

A In so many words.

Q Is that what you told this jury on direct [1360] examination?

A That, it influences that he has engaged in criminal activities?

Q Psycho-path also, does the same thing, doesn't it, Doctor?

A Certainly.

Q And, that doesn't have anything to do with mental retardation in and of itself, is that right?

A It may have something to do with it.

Q You can be a psycho-path and have a high IQ or be a psycho-path and a low IQ?

A That's correct.

Q Ted Monday, he had a high IQ?

A Average from what I understand.

Q Finished college nearly got out of law school, didn't he?

A He was in law school.

Q He was a psycho-path, too?

A From what I understand, anti-social personality. disorder.

Q That has something to do with committing crimes doesn't it, Doctor?

A Yes, it does.

Q Very important factor, isn't it?

A It is an important factor in understanding criminal [1361] behavior.

Q I didn't hear you testify about what your opinion as to the personality of this Defendant?

A No, Sir.

Q Is that because you avoided looking at all of these other records?

A I wasn't asked the question.

Q Do you think he is a socio-path?

A I think his history borders on anti-social behavior, there is no doubt about that.

Q He is a psycho-path?

A That is an older term. Anti-social personality disorder is the newer term for diagnosis, diagnostic and – .

Q Just like you were using brain damage and brain impairment, is that an older term and new term, and psycho-path, socio-path, anti-social personality are all the same thing?

A They are approximately the same thing, Sir.

Q In other words when you professionals change the terminology from psycho-path to anti-social personality, you didn't change the requirement or the definition of the individual?

A Well, actually they did change, the criteria but, I don't think it is a substantial change. [1362] They did change some of the criteria.

Q Didn't change – when it changed the name, I just created a new category, is that what you are telling us?

A No, they changed it so that in order to diagnosis an anti-social personality disorder, it became a checklist of acts that occurred prior to the age of fifteen, and then, also, there is a separate set that occurs after the age of fifteen. When they called it psycho-path, it was more of a subjective category that was not linked as closely to the individual's behavior. So, they changed it and it is essentially as I said, essentially the same thing.

Q But, now, in order to diagnosis somebody anti-social, it is a certain trait that has to occur prior to a certain age, is that correct?

A Yes, that's correct.

Q Johnny Paul Penry has demonstrated that, it occurred prior to that age, isn't that correct, Doctor?

A There are several of those acts or behaviors that are found in his history prior to the age of fifteen, that's correct.

Q Okay. For example, we were talking about a moment [1363] ago, Austin State Hospital. You weren't

furnished some of the records. I believe that you said earlier, and I am showing you a document that is dated August 24, 1973, and it was done down in Harris County Mental Health Screening Service, intake history. Part of his Austin State Hospital records that you didn't see, is that correct?

A Yes, Sir, that intake history questionnaire, no.

Q Okay. That indicates that he was charged with arson, does it not at that time?

BY MR. SMITH:

Objection, Your Honor on the grounds previously urged that I made this morning.

BY THE COURT:

Overrule the objection.

Q That indicates that he was charged with an arson, does it not?

A Yes, Sir.

Q Isn't arson one of the traits or activities of anti-social personality?

A Yes, especially prior to the age of fifteen, and that was referred to in the report that I have reviewed from Austin State Hospital.

Q Oh, it was?

A Yeah.

[1364] Q Okay. But, he had been charged with an arson? Also, did you see early acts of homosexuality in Mr. Penry?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Overrule the objection.

A That was referred to in the report I believe, from either Austin or it could have been from Rusk, as well as a previous evaluation, those acts were in summary of what I think the intake questionnaire is easily summarized in the report, and it was referred to in the records that I reviewed.

Q So, you were aware that he was an arsonist, he had committed homosexual acts is that right?

A That is what it stated.

Q Also, aware that he is a runaway?

A It said in the records that he had, on more than one occasion, had runaway from home, that's correct.

Q That is another trait of anti-social, isn't it, in children?

A Under the age of fifteen, yes, it is.

Q Okay. You also see acts of violence and cruelty [1365] towards other siblings, in his record?

A There was a referral to an act involving his brother, I believe, in one of the reports.

Q What kind of a referral was that to his brother?

BY MR. SMITH:

Objection, Your Honor. Can I approach on that one?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I want to record my objection to the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and corresponding clauses of the Texas Constitution and the Texas Code of Criminal Procedure. This is an attempt to pry out highly prejudice information before the jury, which has no bearing on the witness' testimony, and is grossly prejudice and a violation of due process.

BY THE COURT:

What is it that you are questioning [1366] him about, the homosexual acts, Mr. Price?

BY MR. PRICE:

Yes Sir.

BY THE COURT:

The objection is sustained, then.

BY MR. BROWN:

Reply to that objection?

BY THE COURT I asked him what he was questioning him about.

BY MR. PRICE:

Questioning him about these records, Judge.

BY THE COURT:

What acts are you trying to bring out?

BY MR. PRICE:

The fact of the prior – I don't know he said he saw some acts, and I was just wondering what he was talking about. I didn't have any idea what he was talking about. He referred to it himself, and I just asked what act it was.

BY THE COURT:

[1367] Go ahead and ask the question. Objection is overruled. (END OF CONVERSATION HELD AT THE BENCH.)

Q What act was that, Doctor, concerning his brother?

A Something about picking the skin off of his feet.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SIX WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I show you what has been marked as State's Exhibit Number Ninety-Six, records from the Austin State Hospital, I have already asked you about this intake information, history that was from Harris County and I believe that you were not furnished that, is that your testimony?

A That's correct.

Q Now, I want to refer to a letter dated August 15, 1973, to a Mr. Leikam, from a psychiatrist, I believe. Were you furnished that?

A That was from Dr. Bell?

Q Exter F. Bell, that's correct.

A Yes, I have reviewed that.

Q That was part of the records that was furnished [1368] to you?

A Yes. I have a copy here.

Q Does that letter refer to him having been a fire starter, setting fires at an early age?

A It refers to the fact that he was charged with an arson.

Q Look over on Page 2, second paragraph. What does that say?

A "He stated that he had set fires on three occasions, when he was mad at someone."

Q And, he was charged with an arson at the time, also, wasn't he?

A At the time of the letter, I believe, also.

Q This is a letter from the psychiatrist to his lawyer, isn't it?

A To the attorney for Johnny Paul Penry?

Q Yes.

A I assume that is who that is.

Q Right. He is seventeen years old at that time, wasn't he, Doctor?

A 1973? Seventeen, right.

Q And, it says, that he is charged with an arson and he set fires on three different occasions previously because he was mad at somebody, is that right?

[1369] A That's correct.

Q Did you review his Rusk State Hospital records?

A The psychological evaluation that was completed at Rusk, on October 23, 1973.

Q Is that one document?

A Yes, Sir.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SEVEN, WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Would you mind taking out the record that you were furnished from Rusk State Hospital?

A Okay.

Q Is that it?

A This is it.

Q Is it just one document, or several records?

A Three pages.

Q Three pages?

A Yes, that's correct.

Q Okay. This has got more records there represented by State's Exhibit Number Ninety-Seven, is it not, Doctor?

A There are more pages here, Yes, Sir.

Q There is even a kind of a daily history of notes from nurses and things of that nature, on the [1370] ward, reporting his conduct in this State's Exhibit Number Ninety-Seven, is it not?

A Like for me to recite this, probably had progress notes and admission records, psychological evaluations, doctor orders, progress records.

Q Progress records are actually notes of what he is doing on a day to day basis, there is it not?

A It appears from the nurses concerning his activities when he was in the hospital, if he was asleep, whether they check on him or not, and what he was doing.

Q How about if he was setting fire to another patient?

A If you want me to look for that in here –

BY MR. SMITH:

We would object to that question.

BY THE COURT:

Overrule the objection.

BY MR. SMITH:

On the ground previously urged at the bench.

Q See if you can find this page, Doctor?

A No page numbers on it. Is it towards the [1371] front?

Q About the twelfth page down, entries dated November 23, 1973. You got it there?

A Yes.

Q Okay. That top line says, "This patient was caught in the back of the dormitory, along with two other adolescents, beating up on another boy, from the adolescence unit."

BY MR. SMITH:

Renew my objection, under the Confrontation Clause, reading from a document not in evidence, and not been reviewed by this witness.

BY THE COURT:

Objection is overruled.

BY MR. PRICE:

Your Honor, to satisfy Counsel, we would offer into evidence, State's Exhibit Number Ninety-Seven, which is the Rusk State Hospital records.

BY MR. SMITH:

Can I see the document?

BY MR. PRICE:

Don't lose our place.

BY MR. SMITH:

[1372] Alright. We object to hearsay in Confrontation Clause to the hearsay objection, Your Honor.

BY THE COURT:

Is that the only objection that you have to it?

BY MR. SMITH:

Also, under Estelle vs. Smith, and to 805 it contains hearsay within hearsay. I refer to the constitutional amendments that I mentioned and the statutory provisions that were mentioned in our conference at the bench.

BY THE COURT:

Okay. State's Exhibit Number Ninety-Seven, is admitted over the Defendant's objection.

Q Does that entry there on November 23, 1973, state this patient was caught in the back of the dormitory with two other adolescents, beating up on another boy from the adolescence unit?

A That is what it looks like. I can't tell quite what that word is.

Q Let me read it again.

[1373] A "Beating on another boy from the adolescence unit." Yes, Sir.

Q Beating on another boy?

A Not beating up on, okay. I see, I'm wrong.

Q Flip over two pages to October 22, 1973.

A That would be back two pages, right?

Q Forward.

A Is in chronological order, because this is November of '73. So, it would be back.

Q Okay. Find the October 18 – or October 22nd, '73, entry.

A Looks like it is out of order. This is it. It is out of order.

Q Indicating that he was in a fight with some other patients?

A It says, "In an attempt to modify his socially unacceptable behavior of fighting."

Q That is what the entry says?

A Yes. It starts off with saying that he was restricted for twenty-four hours for scuffling with another patient, and that he was restricted from social activities except special ed, vocational ed, and work details in an attempt to modify his socially unacceptable behavior of fighting.

[1374] Q Find October 7th entry there?

A October the what?

Q 7th.

A Okay.

Q What does that entry say about his socially unacceptable behavior? What kind of socially unacceptable behavior do they refer to there?

A On what day?

Q October 7th.

A Okay. "Johnny has company, aunt and father and two sisters."

Q I ask you about the socially unacceptable behavior if you will drop down right below that you will see it.

A "Johnny is being –" I don't know what that says, "On a twenty-four hour restriction from all social activities except special education and vocational education classes with work detail on hospital, III, in an attempt to modify his socially unacceptable behavior of setting fire to other patients."

Q "Setting fire to other patients." Not to a building but, to people, is that right? Is that correct?

A That is what it says.

[1375] Q What is the date on that entry?

A October 7, 1973.

Q You didn't review that record?

A No, I didn't review the progress notes.

Q Okay. I ask you to find this progress record here.

A Does it have a date or something on that?

Q I show it coming right after the October 12th, entry, but, I'm not sure our records are the same.

A Okay.

Q Direct your attention to about the fifth or sixth line down, one, two, three, four, five, six, seventh line down, refer to him setting fire to an apartment?

A Okay. I found the place.

Q Okay. Does it refer to him previously set fire to an apartment in Houston, is that correct?

A Yes, that's correct.

Q Right down below that, where the next paragraph starts, what is the first sentence there say?

A I give up.

Q Let me try it. "He admits that he likes the sound of sirens and fire trucks rushing to the [1376] fire,"

A Okay.

Q Would you agree with me on that?

A Yeah, that is what it looks like to me.

Q Okay. Is that anti-social?

A That is a sign of anti-social behavior, sure is.

Q See if you can find this entry here, 10/03/73.

A That is the next page?

Q Refer again to arson and had runaway from home, about the middle of that top paragraph?

A Okay.

Q Does it refer again to arson and having runaway from home?

A It is another incomplete sentence. It just says "Arson (had runaway home)."

Q Okay. Arson and running away from home are both signs, or indicators in an anti-social personality, are they not?

A Especially before the age of fifteen.

Q We already read out of the reports that at seventeen that he was charged with an arson, and that he had admitted to setting three previous fires, is that correct?

A That is what the record shows, yes.

[1377] Q Can you find this? Maybe you were furnished this one, psychological evaluation, but, were you furnished that one?

A Yes.

Q What is the diagnostic impression, on that one?

A Diagnostic impression, mental retardation, mild, complicated by organicity and deprived social background.

Q Okay. Look up above there where it is referring to the intellectual level. What does it say about his intellectual level, first sentence?

A "Upper mild mental retardation, WAIS Performance indicates functioning in upper mildly retarded level. Bender points to clear organic involvement. Human figure supports impression of retardation with organicity."

Q And, if you would look over to the IQ scores over there. Were you furnished those?

A Yes, I have that.

Q Okay. Were these incomplete also?

A I didn't see the protocol from it.

Q You don't know whether they were complete or not?

[1378] A Let me check that before I say that. There was one of these that said it was a brief form, but, there is no indication in this one, from Rusk, that they omitted any of the sub-test.

Q And, what was his performance IQ on that at that time?

A Performance IQ was 74.

Q And, you say there is a plus or minus how much error built in – these tests?

A On the performance sub-test, on the performance IQ there, the DSM-3 says we add plus or minus five points.

Q I thought you said, five or six. Is one or the other?

A Well, it is actually on the verbal, it is only suppose to be four and on the performance it is six, but, if they stay at five, the DSM-3 but, either four or five, but, they say five.

Q At one time you all thought only it was a three point variance, is that right?

A On the WAIS, or the WISC?

Q You tell me. What is that, the WAIS?

A This one is the WAIS, yes, that's correct.

Q Is that five or six or a three point error?

A On the IQ scores it is a five. On the sub-test [1379] scores it is three. So, two different things.

Q Okay. So, he had a performance of 74, that could mean either a 79 or a 69. Is that where that range – is that what you are talking about?

A Well, this is what you would say if you would look at this IQ score and learned, you would say that you would be ninety percent sure that on the WAIT, his performance wouldn't be 69, 78 also on the performance.

Q What type of IQ test did you do?

A The updated version.

Q What did you show his performance IQ to be?

A 66.

Q About eight points under what this tests shows, is that correct?

A That's correct.

Q A little more than the margin of error, sometimes?

A Well, when they changed the test, and they standardized it, it tends to be a little bit different and to make exact point by point comparisons, we get into some statistical things that I think would be complicated, but, it would show that five or six points either way is at the range we had rather want to look at different terms of level and those are [1380] roughly – those two tests and those two scores you brought into question are not inconsistent in my opinion.

Q Okay. Did you state that in your opinion, that he was an anti-social personality.

A I didn't state that, no.

Q Well, let me ask you in your opinion, does he have anti-social personality?

A He has anti-social history, and that the acts true category would certainly say that his history was positive for anti-social behavior, and I would have no argument with that in any way whatsoever.

Q He has been diagnosed as that?

A That and saying anti-social tendencies, history, with an anti-social behavior, fairly frequently, since, and especially the age of seventeen, had been.

Q You don't have any dispute with the fact that he is anti-social?

A Don't have any dispute with the fact that his history is positive for anti-social behavior at all, no.

Q Have you ever diagnosed anybody as being anti-social personality?

[1381] A Most assuredly.

Q You are not saying that about him, you are having trouble saying that and I just want to know if you can or can't.

A It wouldn't be my first diagnoses, but, I certainly would say, clear cut anti-social tendencies, and history positive for anti-social behavior wouldn't be on the basis for my results, my first diagnosis.

Q I understand what you are saying, but, you are saying that he has clearly got the tendency, but you just can't come out and say that lie is an anti-social personality?

A He is mentally retarded with organic involvement and a history positive for anti-social behavior, that is my diagnosis.

Q Okay. But, you can't – you just won't say that he has got an anti-social personality in your opinion?

A In that category, that is a lot different kind of people. He looks more like people with brain damage that I have seen than those with anti-social personality.

Q Does brain damage preclude someone from being anti-social also?

[1382] A Only the behavior is something to correlate.

Q Mental retardation preclude somebody from being anti-social personality?

A No.

Q Okay. Lets see. We went through Austin and Rusk. You see his records from the Texas Rehabilitation Commission?

A Yes, I did.

Q Have you got those there?

BY THE COURT:

While he is looking for those records, you all approach the bench for just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY THE COURT:

You got very much more?

BY MR. PRICE:

Yes, Sir, a lot more with him.

BY THE COURT:

Are you going to have any redirect?

BY MR. SMITH:

Don't know yet.

BY THE COURT:

[1383] You want to stay awhile? You, got over thirty minutes?

BY MR. PRICE:

Yes, Sir, probably a good hour or better, take him through every bit of these records.

BY MR. SMITH:

For the record, while I am up here, I object to making him read aloud every record that Mr. Price thinks might be relevant to the case, has nothing to do with his direct testimony.

BY MR. PRICE:

Offering these records under all completeness.

BY THE COURT:

Don't ask him to read them any more until you offer them.

BY MR. PRICE:

I won't do that, Judge.

BY THE COURT:

Alright. You don't have any problem with recessing now and coming back in the morning?

BY MR. SMITH:

• • •

[49:1403] DR. RANDALL PRICE

being continued as a witness having testified previously, and this being a continuation of his testimony under oath.

CONTINUED CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you restate your name for the jury, please?

A Yes. I am Dr. Randall Price.

Q And, I believe that you are the same Dr. Randall Price that testified yesterday afternoon, is that correct?

A Yes, that's correct.

Q Did you get a night's sleep, Dr. Price?

A Yes, thank you.

Q Good, good. Did you have a chance to look at any more records on the Defendant's last night?

A No, I did not.

Q Okay. Still talking about the same records, we were yesterday. Okay. By chance, did you pick up, it was your own record, but, I had two or three documents marked as State's Exhibits. Did you by chance pick those up?

A I will check and see. I thought that I had it straight, but, I can check through here and see. [1404] If there are some actually – these were, I think the copies that I had and then they were marked as State's Exhibits after that.

Q Yes, Sir. The only thing I am going to ask that those documents, as well as several more from your file, probably be introduced into evidence, with the understanding and agreement that, we will substitute copies, we will make copies, in other words, at a recess or something and give you back all of your originals.

A Okay.

Q For the time being, we will need to keep those out.

A Okay.

Q Could you, maybe, lets start off by letting you tell us what records you relied on. What records were presented to you that you actually reviewed and used in preparation for your testimony in this case?

A Okay. A psychological report from University of Texas – from the University of Texas Medical Branch in Galveston, dated August 25, 1965.

A letter to the Austin State School from the University of Texas Medical Branch in Galveston dated 5/02/66.

[1405] A psychological report from the Mexia State School dated July 8, 1968.

A set of records from Sam Houston School and from the Goose Creek Independent School District dated – one was an educational prescription dated June 10, 1971, and the other one is a appraisal report dated January 23, 1973.

A letter from –

Q Excuse me a minute. That is an appraisal report, part of the Goose Creek records?

A I believe it is, Yes, Sir.

Q Okay.

A A letter from Dr. – and his last name is Bell, I don't have the first name here, to an attorney dated August 15, 1973.

A psychological evaluation from Austin State Hospital dated September 13, 1973. Also, and evaluation of on admission, Austin State Hospital, dated September 17, 1973.

A psychological evaluation for Rusk State Hospital dated October 23, 1973.

A psychological evaluation from the I think it was the Deep East Texas MHMR Facility, dated November 17, 1976.

A psychiatric evaluation from Dr. Pebbles [1406] dated May 19, 1977.

A psychiatric evaluation from TDC dated August 24, 1977.

A psychological evaluation dated September – excuse me, it was September 18, 1979, from the Texas Rehabilitation Commission, and a psychiatric evaluation from TDC dated 1/24/88.

Q The test that you gave this Defendant, do you have those with you also, copies of the tests?

A Well, I have the protocol here.

Q Okay. That is the paperwork that backs it up?

A I don't have the actual test here.

Q Would you explain to the jury what the protocols are?

A Sort of like the answer sheet, where you would write down the responses and any observations and score. Sort of like an answer sheet.

Q The actual test themselves, are – well, one of them was this puzzle that you showed the jury yesterday?

A Yes.

Q Of course, that wouldn't have any kind of a report on that, other than how he performed?

A That's right.

[1407] Q That is the protocol?

A Yes, Sir, that's correct.

BY MR. PRICE:

I don't want to take up any time now, but, I think I am entitled. Counsel, could I get a copy of his tests and matters of that nature at the next recess or something?

BY MR. SMITH:

I'm sure you can and if it is not here, we will get them.

Q Did you bring them with you?

A I have all of them here.

BY MR. PRICE:

We will get them after a while.

Q I believe you just testified that you did receive some records from UTMB, Galveston, back in 1965 that you used in examining this Defendant, is that correct?

A Yes, that's correct.

BY MR. PRICE:

We would offer into evidence, State's Exhibit Number Ninety-One, which is the records of this Defendant, UTMB Galveston, back in the sixties, which is previously been introduced in a prior [1408] proceeding in this matter as Defendant's Exhibit Number Seven.

BY MR. SMITH:

Can we approach, Judge?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

This is, I believe there is a good deal of hearsay within hearsay, here and there are parts of this document that are inadmissible, but, I would need to review it with more care, if I could sit down and read the whole thing, though, if you want to take a look a while, but, my recollection is that there is hearsay from his mother in here.

BY MR. PRICE:

Might be a letter or something like that in there, but, I don't think there is any –

BY MR. SMITH:

Why don't you go ahead and question [1409] the witness now, and if I have a problem with one of these questions, I will say so and we will hold it over until later.

BY THE COURT:

Well, I am going to admit it, subject to you having the opportunity to object to any part of it, if there is something there, we will take it up and if there is something

that he is on, you stand up and you all can approach the bench.

BY MR. PRICE. I am not going to take him into it. I just want to offer the records, is really all I am doing.

BY THE COURT:

Any objection on that basis, that you have the opportunity to go over it, and if there is something there that hasn't been talked about?

BY MR. SMITH:

Some parts of it, are admissible, and I am not objecting to the whole thing, but, there are possibly some there. We have all of those documents, don't have them in that record, like stapled together like that in that order.

[1410] BY MR. PRICE:

It is your exhibit.

BY MR. SMITH:

He has got a point, but do me a big favor and make a copy at the break and I would appreciate it.

BY THE COURT:

Okay. END OF DISCUSSION HELD AT THE BENCH.)

BY THE COURT:

State's Exhibit Ninety-One is admitted without objection.

Q Now, could I see your records from UTMB?

A (Witness Handing).

BY MR. PRICE:

Mark this as one exhibit.

REPORTER'S NOTE: WHEREUPON STATE'S EXHIBIT NUMBER NINETY-ONE (A) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

I offer into evidence, really, I think all of these records are the same as State's Exhibit Number Ninety-One, but, Ninety-One (A), at least for the purposes of the record, being the documents [1411] relied on by Dr. Price, from the University of Texas Medical Branch in Galveston.

BY MR. SMITH:

Can we approach, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH.)

BY MR. SMITH:

He is certainly entitled to question the witness by what he relied on, no problem with that. I do object to the letter, which is the last two pages here, going into evidence. It contains hearsay, within hearsay, to wit, the

possible description by his mother of Johnny as a child and in violation of the Confrontation Clause, Fifth, Sixth, Eight and Fourteenth Amendments of the U.S. Constitution.

BY MR. PRICE:

Offer it as a business record, as medical records and as a record that he has relied on in this case to give his opinion. This may be hearsay, obviously, [1412] most records are hearsay, but is is a record of the University of Texas Medical Branch in Galveston –

BY MR. SMITH:

It is not the business records or medical information. It must be shown that it was information transmitted by someone at or near the time that it happened. That doesn't meet that test. It is not an exception to the Hearsay Rule.

BY MR. PRICE:

We agreed not to have that kind of an objection.

BY MR. SMITH:

I don't think so, Judge.

BY THE COURT:

I am going to admit Ninety-One (A) over your objection.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

State's Exhibit Ninety-One (A) is admitted over the objection of the Defense.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS NINETY-NINE AND NINETY-NINE (A) WERE MARKED [1413] FOR IDENTIFICATION BY THE REPORTER.)

Q Would you give me the records that you had from the Mexia State School?

A (Witness Handing).

Q Is this the only one?

A Yes.

BY MR. PRICE:

Mark that as Ninety-Nine (B).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-NINE (B) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

I offer into evidence, Your Honor, State's Exhibit Numbers Ninety-Nine and Ninety-Nine (A) which are the records of the Defendant from the Mexia State School, which have previously been introduced in a previous proceeding as Defendant's Exhibits Five and Five (A), and we would offer also into evidence, State's Exhibit Ninety-Nine (B), which is the Mexia records relied upon by this witness.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING [1414] CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Okay. As I understand it, the offer is Ninety-Nine, Ninety-Nine (A) and (B)?

BY MR. PRICE:

That's correct.

BY MR. SMITH:

Ninety-Nine (A) is the thickest of the documents. I have looked through it, but I would ask the same courtesy I was given a minute ago, a chance to look at it at the break and if I find something that I should have objected to, if I wish to raise it later,

BY MR. PRICE:

In fact, to expedite matters, Bob, if you want to, I don't intend to take him through all of these records to any extent. I want to get them all in and I want to do that before the jury, but, asfaras if you want to go through the records at the recess or something and look for something that you don't feel like is admissible, well, I can offer [1415] it with the agreement that you all can look through it and we will take it up with the Court later, and I will agree not to exhibit it to the jury.

BY THE COURT:

You will agree not to exhibit it to the jury?

BY MR. PRICE:

Exhibit it to the jury, and if we get down to something that I am going to exhibit to the jury, I will show it to Defense Counsel first and give him an opportunity to object.

BY MR. SMITH:

I am not quite sure where we stand, Judge. I can make some objections now, and reserve – I might even do that, and I will make it this way.

Ninety-Nine (A) I just want the chance to look through at the break.

BY MR. PRICE:

No problem.

BY MR. SMITH:

As to Ninety-Nine, Judge, I object essentially on the hearsay ground, hearsay [1416] within hearsay grounds previously stated. Also, the Confrontation Clauses, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, Texas Constitution, and Texas Code of Criminal Procedure. I object to Page 16.

BY THE COURT:

I am going to go ahead and look at these other three now while I have got it.

BY MR. SMITH:

Just for the record, that is Page 25, the entire document.

BY MR. PRICE:

Is that a document from another institution? From UTMB, Galveston, probably already introduced in that exhibit, I'm sure, and another copy of the same document.

BY THE COURT:

Okay.

BY MR. SMITH:

I am going to object to these documents on Page 18, the entire document on Page 25, and the document which begins at Page 31, and I would state, Judge, I object to these three exhibits and Mr. [1417] Price if a document is duplicated in there, and objected to it, once, I don't waive any objection by not making it some other time.

BY MR. PRICE:

Correct.

BY MR. SMITH:

Okay.

BY MR. PRICE:

The document, Page 31, and the document on Page 25, that is Mexia. On Page 31, we don't have any objection to withdrawing or we will agree to withdraw Page 31 out of there because that appears to be a document from the University of Texas Medical Branch in Galveston, but, the other documents –

BY THE COURT:

You want to take that out now?

BY MR. PRICE:

Oh. Mexia. They are Mexia State School records, apparently.

BY THE COURT:

You want to just – is that the agreement that you are agreeing to, take [1418] it out and I will rule on it.

BY MR. PRICE:

We will take that Page 31 out of it.

BY MR. SMITH:

31 and 32.

BY THE COURT:

Alright. State's Exhibit Ninety-Nine is admitted over the objection of the Defendant.

BY MR. SMITH:

As to Ninety-Nine (A), Judge, that is the one, if I could have the courtesy of looking at it for details, but, still I have an objection that the document that begins at Page 39 and ends at Page 40, I will object to that.

BY MR. PRICE:

Is that okay, we will agree to take that one out, Judge. Appears to be a document from the University of Texas Medical Branch and probably ought to offer it under the other one. I am taking that page out.

BY THE COURT:

Is that all of the objections subject [1419] to looking at it?

BY MR. SMITH:

As to Ninety-Nine (A), that's right. There is some other documents on the inside of the front folder, documents beginning at Page 4, going to Page 7, and I –

BY THE COURT:

Tell me what it is.

BY MR. SMITH:

That is a document in hand-writing, I think, is his mother's hand-writing, an application to the school.

BY MR. PRICE:

That would be part of their records.

BY MR: SMITH:

They are history.

BY THE COURT:

Ninety-Nine (A) is admitted over your objection, subject to anything that you haven't had a chance to look at yet. Ninety-Nine (B) any objection?

BY MR. SMITH:

Ninety-Nine (B), yeah, I do, object to the hearsay grounds.

[1420] BY THE COURT:

Ninety-Nine (B) is admitted over your objection.

BY MR. SMITH:

Hearsay, Your Honor, I am asserting the constitutional grounds that I stated earlier.

BY THE COURT:

Yes, Sir.

(END OF CONVERSATION HELD AT THE BENCH.)

QUESTIONSBY MR. PRICE:

Q State's Exhibits Ninety-Nine and Ninety-Nine (A) represents the Mexia State School records and I believe State's Exhibit Ninety-Nine (B) is the document that you were furnished from Mexia is that correct?

A Right.

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER ONE HUNDRED WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q Would you give me the Goose Creek records that you relied on?

A (Witness Handing).

[1421] Q Okay. A couple of different documents, is that correct, multiple page documents?

A Yes, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER ONE HUNDRED (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

BY MR. PRICE:

Your Honor, we would offer into evidence State's Exhibit Number One Hundred, which represents the

Goose Creek Independent School District records of the Defendant, previously introduced in proceedings in this matter under Defendant's Exhibit Number One. We also offer State's Exhibit Number One Hundred (A) represents the Goose Creek Independent School District records and/or Sam Houston School records that were relied upon by this witness in this case.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

[1422] We have no objection to One Hundred (A), Your Honor. As to Exhibit One Hundred, Mr. Price, has agreed not to exhibit it to the jury for the moment, and, I will review it at our break.

BY THE COURT:

State's Exhibit One Hundred is admitted without objection, with the understanding that before any part of it is exhibited to the jury, that the Defense will be given an opportunity to make further objections. One Hundred (A) is admitted without objection.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Again, showing you One Hundred, Goose Creek Independent School District's records, and you relied on State's Exhibit Number One Hundred (A) is that correct?

A That's correct.

Q Okay. I believe you said that you also relied on a letter from Dr. Bell to an attorney is that correct?

A That's right.

Q What part of the record did that come from, do you have any idea?

[1423] A I don't know what part of the record that it came from, no. It was a psychiatric evaluation.

Q I show you what has previously been marked as State's Exhibit Number Ninety-Six, which represents the Defendant's records from the Austin State Hospital and it has previously been introduced in prior proceedings in this case as Defendant's Exhibit Number Eight.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SIX (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q And, referring you to Page 11 of that document, and then, I am going to show you what has been marked as State's Exhibit Number Ninety-Six (A) which is the letter that you said that you relied upon from Dr. Bell, and I just ask you is this letter that you relied upon, State's Exhibit Number Ninety-Six (A), the same letter that appears on Pages – well, 11 through 13 in that document, State's Exhibit Number Ninety-Six?

A It appears to be, yes.

Q Okay. Got any question about that?

A No.

Q Appear to be the same letter? Take your time.

A Yes, same letter.

[1424] Q In addition, were there other records from the Austin State Hospital that you relied upon?

A (Witness Handing).

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NINETY-SIX B WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q I show you what has been marked as Exhibit Ninety-Six (B) and is that the other document or couple of documents from the Austin State Hospital, I believe, two different documents, or several documents that you relied upon?

A There are two I think. Yeah, those are the documents from Austin State Hospital.

BY MR. PRICE:

Okay. At this time, Your Honor, we would offer into evidence, State's Exhibit Number Ninety-Six which is the Defendant's records from the Austin State Hospital, previously admitted in prior proceedings as Defendant's Exhibit Number Eight and also offer State's Exhibit Number Ninety-Six (A) which is a letter from a Dr. Bell relied upon by this witness in examining [1425] the Defendant, and is part of State's Exhibit Number Ninety-Six, the Austin State Hospital records and offer into evidence, State's Exhibit Ninety-Six (B), which contains two other documents relied upon by this witness contained in the Austin State Hospital records, and we will agree, Your Honor, in the interest of time, not to present any of the

records to the jury, until Counsel has had an opportunity to go through them.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

As to Ninety-Six (A) and Ninety-Six (B), Your Honor, while I do not object to use them to question the witness, I do object to the Confrontation Clause hearsay, and constitutional grounds, Fifth, Sixth, Eighth and Fourteenth Amendments and the other provisions mentioned earlier, as coming into evidence, and indicate as to Ninety-Six I will have to reserve my objections [1426] until I have had a chance to review them.

BY THE COURT:

Ninety-Six (A) and (B) are admitted over the objections and Ninety-Six is admitted over the objection also.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Again, I believe Ninety-Six (A) and (B), constitute the records furnished to you by Austin State Hospital, State's Exhibit Ninety-Six or what we claim constitutes the records up there, is that agreeable?

A Those are records that I reviewed, Yes, Sir.

Q Do you mind giving me the records that you had from the Rusk State Hospital, please, Sir?

A (Witness Handing).

Q Thank you. You are ahead of me.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NINETY-SEVEN (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q I show you now what has been marked as State's Exhibit Ninety-Seven (A), and ask you are those the documents furnished to you and upon which you relied on in examining this Defendant and the Defendant in this case?

A Yes, that's correct.

[1427] Q How may documents? Is that three pages?

A Yes, correct.

BY MR. PRICE:

Your Honor, at this time, we would offer into evidence State's Exhibit Number Ninety-Seven, the Defendant's records from the Rusk State Hospital, previously introduced in prior proceedings in this case as Defendant's Exhibit Number Two, and, also offer into evidence Ninety-Seven (A) which is the records that this witness relied upon.

BY MR. SMITH:

Again, Your Honor, we would agree with respect to State's Exhibit Number Ninety-Seven, that allows Counsel an opportunity to review it and make objections. We will agree not to present it to the jury at this time.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

On Ninety-Seven, we reserve our objection to it. On Ninety-Seven (A) see it for a second. We object to the [1428] document and specifically to the reference as to the fire to the apartments in Houston, fire setting in Houston, that is hearsay evidence and no indication of its source or reliability, and we object to the Confrontation Clause, Fifth, Sixth Eighth, and Fourteenth Amendments and the other provisions stated earlier.

BY THE COURT:

Ninety-Seven (A) is admitted over your [1429] objection, and Ninety-Seven is admitted – it was admitted yesterday, and it is admitted again, we the right that you will have the right to look at it over your objection.

BY MR. SMITH:

Alright.

(END OF CONVERSATION HELD AT THE BENCH.)

A And, it was actually from Dr. Pebbles, also, MHMR.

Q I think they are in. Can I see your MHMR records?

A (Witness Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS ONE HUNDRED ONE AND ONE HUNDRED ONE (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I am going to show you first of all what has been marked as State's Exhibit Number 101 (A), and

ask you are those the documents from MHMR that you relied upon?

A Yes, they are.

Q Now, I want to show you State's Exhibit Number 101, and I am going to direct your attention to a couple of documents in there that I marked already about half way through, The first [1430] document there, does that appear to be the same document that is a letter from Dr. Pebbles, that is part of State's Exhibit Number 101 (A)?

A Yes, it appears to be.

Q And, if you would, the next document does that appear to be the same document in 101 (A) which is a document signed by Mary Cochran, psychologist?

A Yes, it is.

BY MR. PRICE:

Your Honor, we would offer into evidence, State's Exhibits 101, the Defendant's records from Texas Department of Mental Health and Retardation in Polk County, and State's Exhibit Number 101 (A) which is the document which the witness relied upon.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, for the purposes of the record, for all of these exhibits, on the Punishment Phase Exhibits, we would agree for Counsel to make objections out of the presence of the jury.

BY MR. SMITH:

[1431] As to 101 (A), Judge, we object on the grounds of insufficient, we usually go earlier, and also, the Fifth Amendment etc.

BY THE COURT:

State's Exhibit 101 (A) is admitted over the Defendant's objection, and 101 is admitted over the objection, subject to making further inspection of it.

BY MR. PRICE:

Yes, Sir. For the purposes of the record, I might add that State's Exhibit 101 has previously been introduced in these proceedings under Defendant's Exhibit Number Four.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you have any Texas Rehabilitation?

A Yeah. (Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS 102 AND 102 (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I will show you what has been marked as State's Exhibit 102 (A) and ask you if that [1432] is the document that you relied upon in this case?

A Yes, it is.

Q I don't believe that document is contained in State's Exhibit 102, is it?

A I don't think so. I didn't see it when you were going through it.

BY MR. PRICE:

Your Honor, apparently State's Exhibit 102, which has previously been introduced as Defendant's Exhibit Number Three in a prior proceeding as the records of the Rehabilitation Commission does not contain the document marked as State's Exhibit 102 (A) which was relied upon by Dr. Price. In any event, we would offer State's Exhibit 102 and Exhibit 102 (A) as being the records of the Defendant's from the Texas Rehabilitation Commission.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, we have documents out there, [1433] that we have since supplemented, and I want to ask the witness.

Q Again, to compare State's Exhibit 102 (A) to a portion of the record of State's Exhibit 102, which was previously Defendant's Exhibit Number Three, and see if that is the same document that starts on Page 16, I believe?

A Yes, it is.

Q And, again, you relied upon State's Exhibit 102 (A) is that correct?

A That's correct.

BY MR. PRICE:

We would offer State's Exhibit 102, which is the Defendant's records from Texas Rehabilitation, and State's Exhibit 102 (A), which is the record relied upon on this record.

BY MR. SMITH:

102 we have the same objection as before, and as to 102 (A) we object for the reason previously stated, and stand on Ezelle vs. Smith, Your Honor.

BY THE COURT:

Okay. 102 (A) is admitted over the objection of the Defendant. State's [1434] Exhibit 102 is admitted over his objection on that grounds, but, with the understanding that the Defendant will have the opportunity to review each item in 102, before it is passed to the jury, to make further objections.

Q Dr. Price, I believe that you also reviewed psychological evaluation reports that were part of the record of this Defendant at the Texas Department of Criminal Justice, is that correct?

A Yes, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-FIVE (C) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I am going to show you what has been marked as State's Exhibit Ninety-Five (C) and ask you are those the documents that you relied upon that were part of the Defendant's record at the Texas Department of Corrections or Texas Department of Criminal Justice?

A Yes, they are.

Q Okay.

BY MR. PRICE:

Judge, since State's Exhibit Number [1435] Ninety-Five, Ninety-Five (A) and (B), which represents the records of this Defendant at TDC, are quite voluminous and might take us a little time. I am not going to make an offer at this time, and we will wait until a break, maybe and we can both look at these documents to be sure they are part of the other exhibit.

BY THE COURT:

Are you going to offer Ninety-Five (C)?

BY MR. PRICE:

Yes, I will offer Ninety-Five (C) at this time, being the records relied upon by the Doctor.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, I do object to Exhibit Ninety-Five (C) on the grounds that we just stated, Ezelle vs. Smith grounds, and I called Mr. Price's attention to one specific line in which he has agreed [1436] should be retracted out in the appropriate way.

BY THE COURT:

They can't read it from here. That has been – what part are ya'll agreeing you want to take out?

BY MR. PRICE:

I don't mind taking out the part about death row for capital murder. I think we are entitled to get it in.

BY MR. SMITH:

I don't think it should be in at all.

BY THE COURT:

Ya'll are both –

BY MR. SMITH:

I am going to object to the whole document, but, if it is admitted, it should be retracted out.

BY MR. PRICE:

I have no problem with that, just go ahead and mark it out.

BY THE COURT:

If you would do it, black it out right now.

[1437] BY MR. SMITH:

I don't object to your taking the pen –

BY MR. PRICE:

Where it says "Death row for capital murder."

BY THE COURT:

I will just do that. (The Court blacking out the objectionable part of the record.)

BY MR. SMITH:

Before that goes to the jury, just make a zerox of it. Leave it this way, zerox it before it goes to the jury. I will hold it up to the light.

BY THE COURT:

Ninety-Five (C) is admitted over the Defendant's objection. Is that all these exhibits?

BY MR. PRICE:

Yes, Sir. I proved them all up.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

Lets recess about ten minutes and start back – fifteen minutes, start at [1438] fifteen until eleven. That's about eleven minutes.

REPORTER'S NOTE: (WHEREUPON A FIFTEEN MINUTE RECESS WAS HELD.)

BY THE COURT:

Are you all ready? Bring the jury in.

(JURY IN)

BY THE COURT:

You can proceed with your cross examination of Dr. Price, Mr. Price.

BY MR. PRICE:

Thank you, Your Honor.

Q I promise you and the jury that this is the last time I am going to talk about these records, to speak of, but this stack of records here are the ones that were given to you, right?

A Yes, that's correct.

Q And, these represent the records that we contend are his mental health records?

A Yes, that's correct.

Q Dr, Price, I had one document here that during the break, from TDC, that I wanted to show you. One of the documents that have previously been admitted into evidence as State's Exhibit Number [1439] Ninety-Five (C), the second document there, I want to show you a document in State's Exhibit Number Ninety-Five (B). Is that the same document, Doctor?

A Yes. It has four pages. That's it.

Q Okay. Same document?

A Right, that's correct.

Q Okay. And, you got the test copies still there in your file, do you not?

A Yes, I was pulling those right now.

Q Okay. We will get to those at the break. No problem. Doctor, I believe, that you said that you saw the Defendant the first time on April 20th, is that correct?

A On April 20th, correct.

Q That is this year, correct?

A That is 1990.

Q When were you first contacted by the Defense?

A It was sometime early in April, I believe around the ninth or tenth.

Q On April 20th, you met with this Defendant, and I believe you indicated earlier that you took a background history off of him?

A It was a clinical interview where I asked questions about his present condition and past health, [1440] possibility of accidents that sort of thing.

Q Did you take a criminal history from him?

A No, I did not.

Q Didn't go into any of his background asfaras anything, – any of his background asfaras any prior acts of violence?

A No.

Q Specifically, did you go into with him, the circumstances of the murder of Pamela Carpenter?

A I didn't ask about that, no.

Q Okay. Did you ask him about the rape of Diane Koch?

A I didn't ask about that, no.

Q You didn't ask him about any kind of a prior criminal record or criminal offense, is that correct?

A That's correct.

Q How long did you visit with him on April 20th?

A It was approximately three hours.

Q What did you talk to him about for three hours, just generally speaking?

A School, experiences, what kind of jobs he had had, prison, and what he was doing there in terms of education opportunities, past experiences which asfaras he could remember, concerning [1441] health; what he understood to be in terms of questions that I asked him, about his past, when it came to medical and educational history.

Q In this three hour interview with him, did you detect any type of what you might consider mental illness?

A Well, mental illness, I did detect and thought there was a possibility of the fact that he is mentall retarded, which is a mental disorder.

Q My specific question deals with mental illness. There is a difference between mental illness and mental retardation, isn't there?

A Yes, there is.

Q Did you detect any type of mental illness?

A In the psychiatric mental disorder, other than retardation, no.

Q No, psychosis?

A No, psychosis.

Q He was in touch with reality?

A Yes.

Q He knew what was going on there?

A Seemed to, Yes, Sir.

Q And, then, on May 8th, is I believe is when you gave him this Halstead Neuro-Psychological Battery, is that correct?

[1442] A Yes

Q That was about four hours on that date?

A Yes.

Q What that primarily taken up with testing?

A Yes.

Q You didn't take up any additional information?

A No additional history or interview, no.

Q Then, on June 13th, is that when you performed the IQ test?

A IQ testing, Yes, Sir.

Q How long did you spend with him on June 3rd?

A Approximately three hours.

Q Was that totally taken up with the IQ test?

A Asfaras I can remember. I think I repeated one of the test, or I gave one test out of Halstead on that date, the trial making test, but, other than that, that time period was taken up with testing.

Q What type of test out of Halstead?

A The trial (A) and (B). It was part of the battery that I didn't complete on the 8th.

Q Okay. And, that was the total of what, about ten hours altogether that you were with him?

Yeah, approximately ten and eleven hours.

You indicated that you didn't detect any mental illness in him on the 20th of April. Would the [1443] same be true for May 8th and June 13th?

A That's correct. In terms of psychosis and that type of thing, no.

Q Is there some other kind of mental illness that you detected?

BY MR. SMITH:

May we approach, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH.

Your Honor, I object to the District Attorney's attempt to prove mental illness and make it sound like a mitigating or aggrevating factor, is not an issue here, and I object on the Fifth, Sixth, Eighth, Fourteenth Amendments of the U.S. Constitution and the Texas Code of Criminal Procedure.

BY THE COURT:

Objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

[1444] Q There is a difference between mental illness and mental retardation isn't there, Dr. Price?

A Mental retardation is a mental disorder.

Q Yes, Sir.

A And, the term mental illness, generally it is more of a lay term that applies to psychosis, or a case of depression, sometimes, but, usually, they refer to that when it is a psychosis, so, it is a mental disorder, is a technical term there is a – difference, but, a mental retardation is a mental disorder.

Q Aside – maybe we can approach it this way. Aside from what you feel like there may be as faras any mental retardation did you detect any other type of mental disorder in the Defendant?

A Aside from the mental retardation and organic brain disfunction, no, I did not detect any other type of mental disorder.

Q Okay. No psychosis, no schizophrenia or nothing of that nature?

BY MR. SMITH:

May we have a continuing objection?

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Can we have an exception on that [1445] ruling?

BY THE COURT:

Yes, Sir.

A That's correct. I did not detect the psychosis or schizophrenia.

Q I believe you indicated that he was cooperative asfaras when you administered the Halstead Neuro Psychological Battery, is that correct?

A Yes, that was my opinion.

Q Was he also cooperative when you administered the IQ test?

A Yes, Sir.

Q Was he cooperative when you interviewed him and got this background history from him?

A Yes. I had to establish some – the first time I saw him, but, he was cooperative.

Q I am going to ask you a little bit about the Halstead Test that was administered on – I guess it was administered on, primarily on May 8th, one part of it was given on June 13th?

A That's correct.

Q The puzzle that you showed the jury yesterday. On that particular test, did I understand you to say that the first time that you administered it, it took him eleven minutes to complete that puzzle?

[1446] A Yes, that's correct, actually 11.2.

Q 11.2 minutes?

A Right.

Q And, the second time that he did it, how long did it take him?

A It took fourteen minutes.

Q I thought you said it took fourteen and a half. Was it fourteen or –

A It was fourteen and two seconds, so, fourteen is accurate.

Q Okay. And, the third time was how long?

A The third time administered the test, was four minutes.

Q Okay. So, he went to eleven minutes the first time, took him three minutes longer to do it the second time, and then, he reduced it all way down to the four minutes on the third time, is that correct?

A That's correct.

Q Did that indicate to you any kind of a malingering or faking?

A No.

Q None at all?

A No.

Q Okay. This test, this Halstead Test that you administered, isn't it correct that some of [1447] the assessment of that test is up to the examiner, that you have to apply a subject decision as to certain aspects of that test?

A Interpretation?

Q Yes.

A Is up to the examiner.

Q Okay. And, for example, on this particular test, lets just take this total situation as demonstrated to the

jury. You were the one that decided ultimately that Number One that he wasn't faking and Number Two, that this indicated mental retardation to you, is that correct?

A That was an indication of organic brain impairment, yes.

Q When you say, organic brain impairment, are you talking about an organic brain damage, is that what you are saying?

A Yes, we talked about impairment as a term, if there is no known cause that we can point to exactly, that we know for sure caused it like in [1448] the case of a head trauma, we say impairment, in that it is a problem in functioning, that is what we can be sure of, if there is no known exact and specificy ideology, or cause.

Q Did I understand your testimony yesterday, that the test is ninety to ninety-five percent accurate?

A As the overall battery and a discrimination between those were non-impaired brain and impaired brain, that the accuracy is over ninety percent.

Q That is assuming that there is no faking?

A Assuming that.

Q Are you telling the jury in your opinion that there is physical brain damage, this Defendant suffers from physical brain damage?

A Yes, and that he had brain impairment from some cause of brain damage, Yes, Sir.

Q You understand what I am talking about, when I say physical damage to the brain?

A Yes, I think I do.

Q As opposed to just being someone that is born and that their brain does not function as well as somebody elses brain, but, you are talking about an actual damage to the brain, are you not?

[1449] A Yes, although that the damage could have a prenatal origin that would be born with it, that way.

Q For example, an injury to the mother maybe while she was carrying the child?

A That's correct.

Q I believe you gave an example also, of alcohol?

A That would be another possibility, yes.

Q The fifteen item test that you held up and showed the jury yesterday, is that the sensory perception part of the Halstead Test?

A No, it is not.

Q What part is that called, or is that part of

A Halstead Test?

A No, it is part of a Halstead Battery.

Q What was it, what was the purpose of it?

A The purpose of it is to, as I explained, to give the person an opportunity to fake, and it is a way to detect if they are trying to do poorly, but, it is an important part of the Halstead-Raycon Battery. It is an additional technique for that purpose.

Q And, you performed that by showing him this piece of paper that you showed the jury yesterday, [1450]

which has fifteen items on it, and you allow him to look at it for ten seconds, and what did you require him to do?

A Draw as many of them on.a piece of paper.

Q On a piece of paper?

A Yes.

Q As I remember, he got twelve out of the fifteen, after looking at this for ten seconds, is that right?

A That's correct.

Q Would that indicate to you at least his memory was in tact?

A Grossly so, Yes, Sir.

Q Did he follow his instruction that you gave to him to taking these tests?

A Yes.

Q He was able to control himself, around you, was he not, Doctor?

A Seemed to be, Yes, Sir.

Q He didn't attack you or anything like that, did he?

A No, Sir.

Q Or attack anybody else around during your presence?

A No, Sir.

[1451] Q Did he act inappropriately asfaras any kind of

A violence or,anything of that nature?

A No, Sir.

Q Did he exhibit to you an understanding of the difference between right and wrong as the average person?

BY MR. SMITH:

Objection, Your Honor. On the grounds previously stated.

BY THE COURT:

Overrule the objection.

A I didn't ask him if he knew the difference between right and wrong.

Q Well, you talked to him for eleven hours, though, Doctor, You kind of arrived at an opinion about whether or not he had an understanding between right and wrong, didn't you?

BY MR. SMITH:

Your Honor, can we have a running exception, Your Honor?

BY THE COURT:

Objection is overruled. Yes, Sir.

Q Weren't you able to conclude that he did know the difference between right and wrong?

A I would say so, Yes.

[1452] Q Okay. And in any kind of psychological test, being an expert in the field as you are, you recognize

obviously, the possibility of faking or as it is referred to in your profession, I believe, malingering, is that correct?

A Yes, that's correct.

Q You recognize the possibility of that being in existence, in this case, do you not?

A Yes.

Q At the time you examined him and gave him these psychological test, both the Halstead Battery and the IQ test, was this Defendant charged with capital murder?

A Yes.

Q His trial was eminent, was it not?

A Yes, Sir.

Q He was facing the possibility of a death penalty was he not?

A Yes, Sir.

Q He was well aware of all of that, was he not?

A Yes, Sir.

Q Do you think that would almost have to have some effect on his taking these tests under those circumstances?

A I think it is a distinct possibility, certainly, [1453] it would seem to me to be so.

Q Can you think of a much stronger reason to malinger than to be confronted with the death penalty?

A Not for most people.

Q And, isn't it true, and I believe didn't you quote the DSM-3 yesterday in some of your testimony?

A Yes.

Q You know what that is don't you?

A Yes.

Q What is it, tell the jury.

A It is the diagnostic and statistical manaul of the American Psychiatric Association, the third edition that is what the three is, DSM-3 that is what it stands for. The manual to be used by psychologists and psychiatrist who diagnose mental disorders.

Q And, they have a section in that book, dealing with malingering, do they not?

A Yes, Sir.

Q Are you familiar with that?

A Very much so.

Q At the time that you examined Mr. Penry, had you been referred or had he been referred to you by an attorney?

[1454]A Yes, he had.

Q And, he had pending criminal charges against him, did he not?

A Yes.

Q In fact, the most serious one under Texas law, capital murder, is that correct?

A Yes, Sir.

Q And, I believe you indicated in your testimony yesterday, that there was definitely the presence of anti-social personality traits, were there not?

A Yes, Sir.

Q Does not DSM-3 state as follows: "That malingering should be strongly suspected if any combination of the following is noted," and two of those items are, "One, medical/legal context presentation, for example, the person being referred by his or her attorney," and another one, "The presence of anti-social personality disorder?"

A Those are two of the four, Yes.

Q And, the manual says, that any combination of those four, and that would be a combination would it not?

A Yes, Sir.

[1455] Q "Any combination, then, malingering should be strongly suspected," should it not?

A That's correct.

Q Okay. Common sense kind of tells you that, too, wouldn't it?

A I think so.

Q Don't have to be a psychologist or a lawyer or anything else to figure out somebody facing the death penalty, got a pretty good motive for malingering?

A I think so.

Q Did you ever see Dr. Dickerson's report on this matter?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

What is your objection?

BY MR. SMITH:

Approach?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I'm not sure where Mr. Price is going with this. We may well have an [1456] Oklahoma problem. I don't think he has any right to bring out that we may have had other experts do other reports.

BY MR. PRICE:

I want to ask, him, had he seen the report. If he has seen the report, then, I intend to ask him about it. If he hadn't seen it, then, I can't ask him about it, if he agrees with it or not.

BY MR. SMITH:

I don't think he should be mentioning the names of those doctors that have examined this man, in the presence of the jury, and ask him what he saw.

BY THE COURT:

Your objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Did you see a report from Dr. Wendell Dickerson a psychologist for the Defense, concerning this Defendant?

A No, Sir.

Q Excuse me. It was Dr. Wendell Dickerson.

A No, I did not.

Q You know who I am talking about?

A I know him, Yes, Sir.

[1457] Q You all worked together some on this case, haven't you?

BY MR. SMITH:

Renew the objection, Your Honor.

BY THE COURT:

Overrule the objection.

Q Haven't you?

A Yes, we have. I talked to him.

Q Okay. But, you never did see his report?

A No.

Q He didn't furnish you with a copy of it?

A I have not seen it.

Q Okay. In addition to malingering, that is something that you obviously would want to take into account in any situation such as this, would you not?

A Any situation where the person is in contact with the legal system, and stands to benefit, I know that it should be suspected.

Q That is a strong motivation to malinger, is it not?

A For some people, very strong.

Q In addition to that, anti-social personality, in and of itself, can be indigitive malingering also, can it now?

[1458] BY MR. SMITH:

I object to it, Your Honor, it is repetitious. He has asked the same question about four times.

BY THE COURT:

The objection is sustained. I think you already asked that question. Lets move on.

Q When you were talking to this jury, yesterday, on direct examination, you were talking about the effectiveness of IQ test in particular, but, I think some of this, would apply also to any kind of a psychological test, probably with respect to maybe the first – there was a built in error of some five or six points, is that correct?

A That's correct.

Q Is it five or is it six?

A Well, how accurate did you want to be? Some people that just want to be sixty-eight percent accurate, say three or four points, and the ninety percent experts say it is five points.

Q Where does the six come in?

A Well, again, that is the standard error on the verbal section is four, on the performance it is [1459] six, and to make things easier to interpret; the DSM-3 says, take a plus or minus five. So, I would generally use five as the constant interval for the ninety percent.

Q That is kind of up to the examiner again, you pick whether it is five or six?

A As to how accurate you want to be, Mr. Price.

Q Okay. You want to be more accurate, you pick six?

A Well, no.

Q Less accurate?

A Yes, if you pick three, it wouldn't be as accurate, you would be probably sixty-eight percent accurate if you pick three.

Q You mentioned another thing that can effect IQ test and I would also ask did that effect the Halstead Test also, error on the part of the examiner?

A Yes, that's correct.

Q That is something that could effect any test is that correct?

A Any test has to be properly administered, scored and interpreted. That part of it is up to the examiner and their experience with them.

Q Okay. You also mentioned that the person that [1460] is being tested could have an effect because they may have a good or a bad day?

A Right. In terms of especially when it comes to mental ability.

Q All of us have good and bad days, don't we?

A Yes, Sir.

Q My day is not very good after sitting here all day yesterday, and I am sure yours is not, either, and incidently, you said another thing that can effect a person's IQ test, is a person can improve. In other words, on the verbal aspect, is that correct?

A That's correct, especially on the verbal IQ, since it is more influenced by educational experience, that is subject to improvement.

Q Of course, you did mention faking or malingering is something that could effect any of your tests, and that is true, is it not?

A Yes, that is true.

Q Could a person taking these kinds of test, aside from the malingering, but, just the mental effect, be effected by the fact that they were facing capital murder charges, facing the possibility of a death sentence, on their mental status, could that effect them?

[1461] A In terms of interference of anxiety with their mental ability?

Q Stress.

A I think that is a possibility, and one of the reasons to establish some degree of – and comfort with the individual, try to minimize that.

Q That would be another factor that could affect the outcome, could it not?

A Some people, it could be a very important factor.

Q One thing that I don't believe you mentioned also, about this, about factors that could effect them, is the bias of a person giving tests, in other words, you?

A Well, that would come in under the possibility of an error by the examiner, if there was bias there.

Q Well, there is another possibility there besides error also, is where you hired by the Defense to do a specific thing, and such as here, to make the examination, you were hired to go out there and examine him, obviously, you knew that it would be to their benefit if he tested out mentally retarded or if he tested out brain damaged, you [1462] knew that going into it, didn't you?

A Yes.

Q What I am talking about here, is not an error on the part of the testor, but, I am talking about a bias in these close areas, where you have to make a judgment call, and it is a close area, you as the testor, can call it left or right, because it is close, and don't you think that is a factor also, that should be considred a possibility, that you are bias because of the circumstances around you testing this individual?

A It should be considered. I call them like it is. If they didn't want to call me, to Court they didn't have to.

Q I'm not, Doctor, accusing you of intentionally doing anything. I am just asking, human nature being what it is, you have already said that some parts of these

tests are left up to your objective judgment call, isn't that correct?

A Some parts of the interpretation, yes.

Q Right. And, wouldn't it be fair to this jury to say that under the circumstances, the way you were hired in this case to go out there and perform these tests, right before a capital murder trial, that, that bias might effect your [1463] judgment a little bit?

A I don't think that would be fair, no.

Q You don't think that would be fair. Okay. That would be up to the jury to decide that?

A That's correct.

Q Another thing that might effect a test is a person being on drugs?

A That's correct.

Q You know what kind of drugs that he was on on the dates that you examined him?

A I would have to check the record. It wasn't anything anti-psychologic, such as major tranquilizers and that would be the main drug that I would be concerned with. And, it is a historic thing.

Q Look in your records there and tell me what kind of drugs that he was on at the time.

A I am trying to think of where that would be. I don't know that I have a notation on that. I'm trying to remember. I think the only thing that I can remember is that it was either antihistamine or something similar to that, but, it wasn't a major tranquilizer that I remember.

Q Antihistamine is something that you take for [1464] a runny nose or something like that?

A Or swelling sometimes.

Q But, you are not aware of any of the drugs that he was on other than antihistamine?

A Well, I know that it wasn't a major tranquilizer and that was what I was concerned about.

Q Okay. Triavil, Elavil, any of those be major tranquilizers?

A That is anti-depressant.

Q Could that effect it?

A They have been shown to effect it. They have not been shown to effect the performance on the neruo-psychological battery significantly. Actually, sometimes they can improve performance because like you were talking about earlier in terms of interference of anxiety, there is also an interference of slowing down when somebody is depressed. So, some of the studies on anti-depression shows it increases their performance because it is not a slow-down.

Q What about a drug that did slow them down, make them sleep?

A Well, it might effect it. The studies indicate the concern is about the major trnaquilizers.

Q In May of this year, I believe, is that when [1465] you took this test?

A. Yes, that's correct.

Q Okay. Would it surprise you that sometime during that month, he was interviewed by Dr. Quijano and during that time, he kept complaining of being sleepy because of drugs that he had taken?

BY MR. SMITH:

Objection, Your Honor, reciting facts that are not in evidence.

BY THE COURT:

Sustain the objection.

Q Did you really check to see what kind of drugs he was on, in all honesty Dr. Price?

A Yes, I asked about the major tranquilizers.

Q Who did you ask?

A I'm trying to think if it was in the record or I talked to Mr. Brewer in the clinic. I remember asking and inquiring about major tranquilizers, that's all I was checking for.

Q When you say in the records, what records are you talking about?

A Well, I don't remember now, I don't remember. I don't have the records.

Q Some of those records that you gave Dr. Mount?

A I don't know. I don't remember.

[1466] Q These TDC records, I guess, is that what you are talking about?

A Either that or it was a psychological evaluation from TDC.

Q That would have the drugs in it?

A Yes.

Q Current?

A Sometimes they would, but, if they were just taken for the short term.

Q Well, I haven't seen the TDC records that you showed us and that has been introduced into evidence, here, doesn't have anything in it, about what kind of drugs that he was on, does it, Doctor?

A I don't recall any.

Q You don't recall anything about drugs now, is that what it is?

A He wasn't taking a major tranquilizer, that's all I know.

Q You just know that he wasn't taking a major tranquilizer?

A That's correct.

Q When you interviewed him there for several hours did you talk about his history of drug abuse?

[1467] BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Overrule the objection.

A No.

Q You didn't?

A No.

Q You didn't feel that was important?

A It could have been a possibility, for a cause of the brain dysfunction, but, actually, the studies indicate contrary to what most people think, that, primarily drugs that cause brain dysfunction, but, other than that, the other ones are equivocal in terms of what they do over a long term to a person's brain.

Q There was a lot of drugs that could have affected a person's capability on the Halstead Test, are there not Doctor?

A If they are taking them currently?

Q Yes, if they were taking them at the time they they were tested?

A Certainly if they were using drugs at the time they were tested, that would be a possibility.

Q Okay. And, no matter whether it was prescribed drugs, or not, you are aware, or you not that [1468] inmates even in the Texas Department of Corrections can get their hands on illegal drugs, are you not?

BY MR. SMITH

Objection, speculation and prejudicial.

BY THE COURT:

Sustain the objection. Disregard the question.

Q Another factor that you didn't mention when you were talking about things that could effect the validity of the tests, is motivation?

A Well, the part about good days and bad days, that also, includes the motivational factors as well as some fluctuation in the person's civility, with regard to fatigue and such as that.

Q That would also be important not only with respect to the test that you gave, but with respect to the test that you relied on out of his past, too, is it not?

A On that particular date, or when he was examined, that could be an important factor, and how hard he tried, that would be a factor that would put a fluctuation and variation in the scores.

[1469] Q For example, an IQ test is based on the assumption that the person being tested is absolutely trying to do their best, is it not, in order to be accurate?

A Well, the IQ test, is based on the assumption that it is their typical performance and that the examiner is suppose to attempt to get as much effort an cooperation on it. When it comes to neuro-psychological test battery, there is more of an emphasis on the person's maximum performance, and sometimes will even go beyond the standard procedures and test the limits, its called. On the IQ test more standardized and the terms of assuming the typical performance without undue low effort and cooperation.

Q I am not sure I understood that.

A It is the assumption, typical rather than maximum on the IQ test.

Q It doesn't measure his maximum intellectual ability?

A That's the point, it doesn't – it meausres a part of intelligence, and that in terms of capacity and what would be possible had the conditions been different, there is nothing that can measure that.

[1470] Q What you are saying, that if it didn't measure typical, does not measure his maximum, then, he could be smarter than what those IQ tests, show then, in effect?

A There is error in the measurement, that's correct.

Q Okay. Anti-social personality is very important with respect to motivation and taking that into consideration is it not?

A I'm not sure I understand the question.

Q A person with an anti-social personality may just simply not care about taking the IQ test they may not care about what their test results are?

A You have to look at the answers in testing them yes.

Q And, not be motivated, in other words?

A I found that experience with them, yes, sir.

Q Another thing involving motivation, I believe we have already talked about it, is the legal problem that a person may be confronted with, particularly the death penalty, that could be a motivational factor also?

A For some, very strong. Others, they may not care about it.

[1471] Q Some, they just don't care if they get the death penalty or not?

A I am sure that there are some.

Q Are there?

A I read about some of the news of – but, I have never examined one that it didn't seem to matter.

Q Okay. It did matter to Mr. Penry, though, didn't it?

A I think so.

Q So, that could be a factor affecting him also, could it not?

A Could be, Yes, Sir.

Q Common sense tells you that, wouldn't it?

A Yes, Sir.

Q Since you, as a testor, has to make these subjective decisions sometimes, and you have to interpret some of these results, in other words, this test is not something that you just stick Johnny Penry's finger into a machine and it spits out a number on the other side that he is brain damaged, or he is not, or he is retarded or he is not, you actually have to apply an interpretation, you have to interpret the test, and do you feel that it would be important to know as much about the Defendant and his background [1472] as possible, wouldn't that assist you in interpreting these tests?

A The more you know about things that are factors that have been shown relevant to brain dysfunction, I think the better off you are in interpreting.

Q I'm not talking about a matter that just pertains to brain dysfunction, I am talking about matters about his

history, about his life, because the type of person he is, because that is what we are talking about, and you ultimately reached that conclusion that he is mentally retarded, brain damaged, or whatever you are talking about, the type of person and wouldn't it help you to know as much about his past as possible, his past history?

A Well, yes, I think as much about the factor is relevant, and there are some that advocate including a procedure from Dr. Raycon, advocate a blind analysis, first, take a look at the data and see what you think without knowing anything about the person and then, finding out about things that are important, such as educational experience, accidents, that sort of thing, and then, to interpret it in light of that, but, to first do a blind analysis.

[1473] Q And, that is what you did, a blind analysis?

A I didn't do that, no.

Q You did a semi-blind analysis?

A I suppose you could call it that.

Q You looked at part of the record, you took a social history off of him, but, you didn't take a criminal history off of him, is that correct?

A That's correct.

Q So, you did a semi-blind analysis and a semi-unbiinded analysis, is that correct? What would be a wide analysis?

A It was an analysis of the results with information that I thought was important to the interpretation.

Q Who decided what was important out of those records?

A I asked for psychological and psychiatric evaluation and I decided what was important out of those for my interpretation.

Q What you are saying is that they sent you a lot more records than that, and you went through them and picked out these, or did they just send you these?

A I think I asked one of the assistants to take out the psychological evaluation because that is all I wanted to look at, as opposed to all [1474] of the other things that have been introduced into evidence.

Q They sent you all of it, or the assistant picked out these is what it was?

A There was a box of records that were sent, which I assume is the box that Dr. Mount obtained from my office, and I took and - I asked them to separate out psychological evaluations especially those scores that was all I cared about seeing, as it pertains to the interpretation of my findings.

Q What happened to that box of records?

A I don't know.

Q How did Dr. Mount get by without those records, without those psychological evaluations?

A Well, he came to my office to pick them up, which would - and there was some articles that he had to see,

and I had them all there and I suppose that is why he got them. I reviewed the psychological evaluation, especially those with scores, that is what I relied upon.

Q You removed those from the records, before Dr. Mount -

A I did not remove them. There was one of the assistants from the case of counsel took them.

[1475] Q So, Dr. Mount's set of records, that didn't have the psychological reports in them, and you had the psychological reports and didn't, have the rest of the records, is that what it amounts to?

A I don't know that.

Q Okay. Isn't it true, Doctor, that good test results, any type of test, results of the test should be consistent with what is really going on in the real world? Is that a fair assessment? In order for it to be an accurate test?

A I guess so. I'm not sure I understand your question, but, if it is, it is not something that has been shown to be valid, I wouldn't consider there being any reason to give the test.

Q The test wouldn't mean anything, really, Doctor, if it didn't represent txue conditions of the person that you are testing, would it?

A Weii, that's true, yes.

Q But, you didn't have all of the facts to compare it with, did you? You don't know whether the test that you administered represents Johnny Penry in reality or not, do you?

A Based on my review and my experience, I think [1476] it represents his brain function.

Q But, it is based on your review of a limited amount of records, and based on your review of a limited social history of Johnny Penry, isn't that correct?

A On a review of those things that I considered, I only reviewed those things that I considered important in my opinion.

Q You didn't consider the criminal history or history of violence, you didn't consider any of that important?

A For the purpose of my evaluation, they may be important for other purposes, but, they weren't for my evaluation.

Q These tests, I guess, what I am really getting at, Doctor, these tests can be somewhat misleading, just the test themselves? For example, if they want to use the example, of if there was really a Tarzan portrayed on TV, and you took that man out of the jungle and gave him this Halstead Test, or gave him an IQ test, he is liable to score down in the mental retardation area, may he not?

A There is a lot of things that would qualify about an answer to testing Tarzan, I think.

[1477] Q What I am saying, you take a person out that has not been exposed to society, social and culturally as others, that would effect an IQ test, would it not?

A Especially the verbal part, yes, that's correct.

Q That's right. You have stated previously, that the anti-social personality is an important factor in considering, is it not, in making the assessment of the individual's mental status, as you have in this case?

A It is important. The presence or absence of that, for the purposes of conducting intellectual and neuropsychological test it was not important for the focus in my evaluation.

Q I think I have got this right. I got it from the court reporter this morning, but, in answer to a question, yesterday, you said, about anti-social behavior and background, it would be important in explaining and understanding the whole person?

A That's correct.

Q Don't you think that going into a person's criminal background and criminal history, specifically the matters that he is charged with this case, would be important with respect to the [1478] anti-social personality and the whole person, as you say?

A It is important to the jury to make their decision?

Q No, important to you for you to make those types of interpretation that those subjective judgment calls, that you got to make in giving those tests?

A Only in terms of suspecting, like we discussed earlier; the presence of faking. Other than that, I don't have any problems with giving the intellectual and mental psychological test without having a complete criminal history. I am not saying it is unimportant. I think it is very important to these proceedings, but, for the focus of

my evaluation, that was not critical for my evaluation of his intelligence and brain function.

Q When you are coming here and telling this jury, and telling this jury in your opinion what his mental status is, and that is what you have done, you have come in here and told them that he is mentally retarded and has got brain damage. That is the whole person, isn't it, isn't that what you are talking about?

A No. I'm talking about those aspects of this person.

[1479] Q Well, I am going to eliminate the physical aspect any kind of a physical handicap, and things of that nature but, in your field, the mental science field, you are talking about the whole person when you come in here and give this jury your opinion, about his mental status are you not?

A Well, the whole person includes things about their moral character, their physical status like you said, everything about them. I'm talking about a brain functioning, and that was the focus of my evaluation.

Q Right. An anti-social personality, is important when you are talking about a brain functioning, is it not?

A Not for the purposes of this evaluation. I didn't take a criminal history and it was for that reason, I don't know how else I can say it.

Q Well, for example, if you had looked at his mental history and you had seen where he was cutting, where he had the ability to reason, where he had the ability to plan, pre-meditate and things of this nature, criminal events and [1480] acts in a loaical sense, at least from a criminal

standpoint, don't you think that would be important to you?

A It would be important, but, it wouldn't change my interpretation of the testing that I gave.

Q If you gave him a test, and it showed mental retardation, low IQ, whatever, but, on the other hand you got a history of this man that shows that he has got a higher IQ than that, that he is capable of functioning much higher than that, wouldn't tht tell you something about your test?

A Well, it would be comparing apples and oranges, that's why I asked for things in the record, that I would compare to, and that was other scores other objective evaluations. I think that information that you are talking about would be important for the jury to consider.

Q But, you didn't intentionally, by chance, avoid going into the criminal history in this matter, did you, or did you?

A I wouldn't have done that, if I was doing this type of evaluation, for any other proceeding, because of what my evaluation is focused on.

Q You would not go into the criminal history?

[1481] A If I was wanting to determine whether a person was mentally retarded, and if that was a symptom of organic brain dysfunction, that would not be a factor that I would have to make, that interpretation.

Q But, it might tell you something about the malinger or faking on the test, if you knew his criminal history, and you knew, based on that criminal history, he could

perform at a higher intellectual level than what the test was showing that might show that he was faking, wouldn't it, Doctor?

A It was enough to know that he was incarcerated and facing trial for capital murder, has the possibility of – and involving capital punishment, that was enough for me to be suspect of faking.

Q But, not enough to use – serious enough to check him out enough to go ahead and find out about his background in great detail, and therefore you would have the facts available to you to make that decision, it wasn't that important to you, was it?

A I don't guess so. I didn't take a criminal history.

[1482] Q And, you are saying that you normally would not take a criminal history?

A I wouldn't if the focus was entirely on the determination of mental retardation and intellectual impairment.

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER 103, WAS MARKED FOR IDENTIFICATION BY THE REPORTER, BEING THE AFFIDAVIT OF DR. RANDALL PRICE.)

Q I show you what has been marked as State's Exhibit Numbers 103. Can you identify that document?

A Yes. This is an affidavit signed by myself on April 14th, and attached report on another case that was a neuro-psychological evaluation.

Q Isn't that exactly what you did on Johnny Paul Penry, a neuro-psychological evaluation?

A And, an intellectual evaluation.

Q This was a different person, was it not, in this report?

A Yes, Sir.

Q And, in this report, you did take a criminal [1483] background did you not?

A Not a complete criminal history, no. It was enough to find out that he had a criminal background, which I knew about Johnny Penny. I didn't take a complete criminal history, on this individual.

Q. You took a substance abuse background on that individual, did you not?

A In that case, the question involved the potential brain dysfunction from a particular drug or probable drug abuse.

Q That was the only reason that was in this report, because that involved drugs?

A It was a possibility of brain dysfunction in that case.

Q What was the purpose of that examination?

A To determine if the presence was there of mental retardation and/or organic brain impairment.

Q Were you given those instructions by someone?

A Yeah, that was the purpose, than is what I was asked to do by Defense Counsel.

Q Okay. Limited to those two points?

A That is what my – that was my purpose in doing the evaluation.

[1484] Q You were not asked to give him a general examination concerning his present mental status generally speaking?

A Well, that I did in determining what test to give and the clinical interview, if you want to call that a general mental status, but, the purpose for the evaluation was to determine if mental retardation and/or organic brain impairment was there and if it was there to what extent and that is what I did.

Q That was the instruction that you were given by Defense Counsel?

A That's correct.

Q Based on your examination and those records that were furnished to you, as well as those others that you gave Dr. Mount, if you saw any of them, and based on all of your training, and experience and all of your qualifications, that you told the jury about yesterday, in your opinion, Doctor, is Johnny Paul Penry a dangerous individual?

BY MR. SMITH:

Objection, your Honor.

BY THE COURT:

What is your objection?

[1485] BY MR. SMITH:

No basis for asking this witness about that, that is not the subject of his testimony.

BY THE COURT:

Overrule the objection.

A If he was in the free world, I would consider him dangerous.

Q Okay. And, that is based on what you saw without even going into his criminal background, is that correct?

A Really not even something – that is a common sense logical opinion that anybody might arrive at in the case without any scientific under-planning to it. You asked, if I had an opinion, that would be my opinion in the free world.

Q He is dangerous?

A Right, but, I wouldn't support that for a scientific opinion by any means,

Q Just quit being a scientist?

A Well, I think that you don't have to be, if you are a scientist, that you don't have to also be illogical and I wouldn't be illogical.

Q I will accept your opinion as a non-scientist that he is dangerous, okay?

[1486] A Okay. Thank you.

Q And, that way – if you can answer my question without talking about it for thirty minutes, that was

without knowing the details of this man's criminal history, you still think he is dangerous?

A Without knowing all of the details, I think that in the free world, that would be my logical opinion.

Q Okay. Now, lets assume, Doctor, that this man is a rapist, he was convicted of rape sent to the penitentiary in 1977, he was released from the penitentiary in 1979, and within sixty days, raped and murdered again, and lets further assume, Doctor, that during this time on death row, he had –

BY MR. SMITH:

Objection, Your Honor. I move to strike and ask for a jury instruction.

BY THE COURT:

Disregard that part of the question. The objection is sustained.

BY MR. SMITH:

Move for mistrial, Your Honor.

BY THE COURT:

[1487] Motion for Mistrial is denied.

Q Further assume that during the time that he had been in the Texas Department of Criminal Justice, that he has been involved in several assaultive offenses, three involving him having homemade knives or shanks, as they are called in the prison system, I am sure that you are familiar with?

A Yes.

Q Do you think, Doctor, based on that, plus what you already know about him that, that would make him a dangerous individual?

BY MR. SMITH:

Objection, Your Honor, there is no showing that there is any showing that there is no scientific basis for an opinion here. This man here is an expert, he is not allowed to lay opinions on such, no scientific expertise.

BY MR. PRICE:

Hypothetical based on the evidence, Judge. He came here and offered himself as an expert.

BY MR. SMITH:

Hypothetical expert, he said there is [1488] no science –

BY THE COURT:

Objection is overruled. You can answer the question, Dr. Price.

Q Would that strengthen your opinion as to his dangerousness?

A Yes, I think so.

Q Okay. Furthermore, Doctor, isn't it also true that sex offenders, particularly rapists, have a high repeat rate, in other words, that they repeat their crime more so than criminals in other areas?

BY MR. SMITH:

Objection on the grounds that no foundation that this witness has the necessary expertise, Your Honor.

BY THE COURT:

The objection is sustained. You can question him as to that.

Q Based on the hypothetical that I gave you, the man having been convicted of rape and then committing rape, murder within a short time after he was released from prison, you think he might be a threat and might be dangerous, even in a prison environment?

[1489] BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection is overruled.

A A threat in terms of engaging in fighting in prison, which is very common, I think so.

Q What about engaging in rape in prison? Are you aware that we have female guards, females that work in the prison system, are you not?

A Yes, I am aware of that.

Q Are you aware that just within the last few hours, we had a guard that was killed by an inmate?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Sustained the objection.

BY MR. SMITH:

Ask for an instruction, Your Honor.

BY THE COURT:

Disregard that question.

BY MR. SMITH:

Move for mistrial.

BY THE COURT:

[1490] Motion for Mistrial is denied.

BY MR. SMITH:

Can we have a continuing objection as to future dangerousness?

BY THE COURT;

You need to stand up and object.

BY MR. SMITH:

Okay.

Q Would he be dangerous with respect, under those hypothetical circumstances that I just gave you of him being a convicted rapist, and then a rape murder, as well as all of the information that you know about him, would you say that he would be dangerous inside the prison environment as well?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection overruled. You can answer the question.

A I think that my lay opinion would be that the environment which is very structured and protected, to insure everybody's safety.

Q Can you answer my question?

A You can repeat the question if you like.

[1491] Q Would he be dangerous inside the prison?

BY MR. SMITH:

Repeat the objection.

BY THE COURT:

Objection overruled.

A Not necessarily. The environment is structured enough that I think that people's safety could be protected. It is not a professional opinion.

Q You mentioned yesterday brain impairment. Is it your testimony that the term brain impairment is now substituted for taking the place of brain damage?

A You can use really either one. I think a brain impairment is more accurate as it pertains to the neuropsychological aspect.

Q People in your profession don't use the term brain damage?

A Yes, we use that at times

Q Sir?

A Yes, we do use that term.

Q Brain impairment covers a much broader area than brain damage, does it not?

A That's correct.

Q Brain impairment could be either physical damage to the brain or non-physical, an injury or not [1492] an injury, but, non-physical dysfunctioning of the brain, could it not?

A I don't know how you could have non-physical brain impaiment or dysfunction. Intelligence can be effected by non-physical aspects of the environment, but, brain functioning is something, if there is brain impairment, something wrong with the brain. I will try to put it in English.

Q Okay. Are you saying that – what is your definition of brain impairment?

A Brain is not working right.

Q Okay. That could be because one person was just not born quite as smart as another person, couldn't it, in some areas?

A Well, that would effect certain aspects of intellectual functioning, but, not all aspects and if there are certain patterns that we know that are identified with brain impairment, and certain paterns because that is the way they were born, certain patterns because they have poor educational and cultural experience.

Q So, when we talk about a brain damage, we are talking about a physical injury to the brain, are we not?

[1493] A Well that is what that term indicates, that, you know that there is something that caused a particular physical injury to the brain and in those cases, it can be shown to cause, – to have caused structural damage which would end up in functional impairment, but, there are other times when you don't know what caused it, you can't look at a brain, put it on autopsy and say, there it is, there is the structural damage to the brain. There are other times that it doesn't show up, like this, and there is still brain impairment, because there is –

Q That is exactly the point that I am talking about, a difference between brain impairment and brain damage, is it not, Doctor?

A Well, I am trying to explain that difference. There is substantially not a difference. Here is the difference. Brain damage means that you can point to a particular cause, you know what it is, had an accident, there was shock and you can point to that person's brain and say, there is where it is structurally damaged. Now, that would end up in brain impairment, but, now there is other kinds of brain impairment [1494] that we are not for sure what caused it. We don't know, and that whatever physical damage that is there cannot be detected by the medical test that are used to detect brain damage, that has a hole in the brain or a tumor or something, it takes up space, so that is the difference. It is a suttle distinction, but, –

Q For the examples that you were giving yesterday, whole? Okay. What does alcohol do, kill brain cells, is that right, excessive use?

A Excessive use will kill it. You can say kill the brain cells, actually would lead to – of the brain, if abused over a long period of time.

Q What is – ?

A That the brain starts to shrink, actually, and space in between the part of our brain that is – in that case, this is also what happens to all of us if we live long enough, that is the brain starts to shrink and that the cyntrical the spaces, inside of the brain, become larger and that will show up on medical test.

Q Is that what you were talking about, about alcohol, yesterday? You gave that as an example, with a World War II bullet, I believe, going [1495] through somebody's head?

A Well, are we talking about alcohol or are we talking about brain damage as a result of a penetrating head trauma?

Q I don't know what we are talking about. I am trying to figure out what the terms that you are using. You keep using brain impairment, then you switch back to brain damage, and I want to know exactly what you are talking about.

A I tried to explain that.

Q Okay. If for example, you mentioned yesterday if I understand, a head injury, and you gave the example of a bullet going through the brain?

A Yes.

Q Okay. That would be brain damage, would it not be?

A Yes, and brain impairment.

Q Okay. Right. It would also be – what if lets see the other examples, that you gave, was minor blows to the head that accumulated over a period of time that might cause damage to the brain. Was that another example that you gave?

[1496] A Yes, and brain impairment, in that example, would be unlikely that we could point to a particular part of the brain and say there it is, there is where the damage is. It is a generalized loss of neuro-function that could come about, from having several, actually come from having several times where the brain is bruised, but doesn't show up, you can't point to it, but, we know it is there because the functioning is impaired. Well, the brain damage is there we just don't know exactly where it is in the brain. So, then, we say brain impairment.

Q Okay. Then, we say brain impairment?

A Brain impairment is less specific as to localization of the injury, the tumor or the damage. Less specific. We usually talk about then a generalized condition.

Q Then, there is a difference, isn't there, there not necessarily – with one another is what my whole point is?

A Well –

Q Brain damage?

A If they were synonymous, I don't think that we would have two terms. They are not synonymous.

Q Now, I want to know what your diagnosis is. Are [1497] you saying that he is brain damaged?

A Yes, I will say brain damaged, Yes, Sir.

Q There is some physical injury to the brain?

A I am assuming from the brain impairment, there is, but, a generalized,is going to involve several areas of the brain, and I can't tell you exactly what caused it or exactly where the damage is, because it is not a focal injury, it is a diffused loss of integrity of the brain.

Q How do you know that?

A From the test results.

Q Okay. What test results?

A The Halstead-Raycon neuro-psychological test battery.

Q That is the only test result that you rely on in that area.

A That is what I relied on in arriving at that conclusion.

Q Okay. Aren't there tests that can be performed to determine the existence of brain damage, physical brain damage?

A I gave one of them, and that is the Halstead Raycon neuro-psychological test battery.

Q I'm talking about a test that actually measures [1498] the brain, that actually measures the brain physically?

A There are medical test that physically are very helpful in detecting a focal or a specific lesion, or infaction, like in a case of a stroke or a hole or a tumor there

are medical test that are very good at that, if there is a particular point in the brain that is damaged.

Medical tests are not good at how sensitive it is, if it is a generalized loss of brain functioning, that happened a long time ago, it doesn't show up on those medical tests, that is why we would like to instead, we look at the person's behavior, that is a reflection of brain functioning in cases of generalized brain damage.

Q With the medical test, though, the medical test that we are talking about, would they be helpful?

A They would be helpful if there was a tumor a lesion and an infaction, something that is a focal lesion point in the brain.

Q Or if there was the contention that a person was – their brain was injured by blows to the head or by a blow to the head, that was so [1499] severe that it injured the brain so badly that it caused the person to become mentally retarded that was not mentally retarded before wouldn't those medical tests be advisable to have performed, have that person's brain examined, and to see if that existed or not?

A No, Sir. Medical test are important, and if there was something that was focal, it would show up. Would not change the results of the neuro-psychological test battery.

BY THE COURT:

Do you have many more questions of this witness?

—

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

At this time, we will recess for lunch. Start back at fifteen minutes after one. You are not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 12:00 NOON THE JURY WAS RECESSED FOR LUNCH UNTIL APPROXIMATELY 1:15 P.M.)

[1500] (JURY IN AT 1:20 P.M.)

BY THE COURT

Alright. You can proceed.

BY MR. PRICE:

Thank you, Your Honor.

QUESTIONS BY MR. PRICE:

Q Dr. Price, I believe, just before the noon break, there you were testifying, were you not? And, I was asking you about a medical test that can be performed to determine the existence of brain damage, is that your recollection?

A That's correct.

Q What type of test are there out there to determine brain damage, medical type tests?

A Well, there would be the EEG, that is an electro-encephalogram. There would be the cat scan, that is

another common one that is used. Some of the newer ones, involve things like the MRI, is the magnetic reasoning imaging, which is another approach to, I think in the sense of taking a picture of the brain, and there is a pet scan, postivetron emission test, which measures the metabolic activity of the brain. Those are some of the ones that are most common of the medical test used. Really, [1501] the most common is the EEG and cat scan. The others are more experimental and newer tests.

Q EEG been around for a long time, hasn't it?

A Yes, Sir, that's correct.

Q It measures the brain waves?

A Yes. It is the way it measures the electrical activity of the brain, and it comes out in wave, they call it brain wave.

Q Did you notice in your examination of those records, and I think it was in those that were furnished to you, may not have been back in 1965, an EEG was performed on the Defendant, Johnny Paul Penry?

A That's correct.

Q And, what was the result of that EEG in 1965?

A I believe it was in normal limits.

Q And, of course, in 1965, I don't believe they even had a cat scan did they?

A I am not sure as to when it was common.

Q The MRI and the postivetron, or the pet scan has been more recent?

A Quite recent. They are fairly experimental.

Q And, did you earlier sign an affidavit in this matter, in this case, that is filed with the Court, requesting that, or stating in your [1502] opinion, under oath, that those tests that you just mentioned to the jury, should be performed?

A Yes, I did.

BY MR. SMITH:

We would object, Ray vs. Oklahoma, Your Honor.

BY THE COURT:

Overrule the objection.

Q And, in that affidavit, did you say that those tests would be – it would be strongly recommended that they be given?

A Yes, I did.

Q And, the purpose being to substantiate the existence of any brain damage, primarily would it not?

A The purpose would be to further explore and substantiate any of the neuro-psychological findings, if there were any.

Q Okay. Okay. That affidavit was signed and filed back in April of this year, was it not?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

[1503] Can I have a running exception on that affidavit?

BY THE COURT:

Yes, Sir.

Q Is that correct, Dr. Price?

A April 24, 1990.

Q Okay. Did you, or has Defense Counsel furnished you with the results of those tests?

A I have had some feedback about the results of those tests, Yes, Sir.

Q What was the feedback that you got about the results of the tests?

A That they were – that they were normal.

Q The EEG was normal?

A That is what I understand, yes.

Q The cat scan was normal?

A Yes, Sir.

Q The MRI was normal?

A Yes, Sir.

Q And, the postivetron or pet scan was normal?

A Yes, that's correct.

Q Did they also request that certain genetic screening be done?

A Yes, I believe so.

Q What is the purpose for genetic screening?

[1504] A My understanding that there are some of the genetic syndromes that may lead to retardation, can be detected with those medical tests.

Q Okay. Did you get some feedback on the results of that genetic testing?

A My understanding that they found no genetic inherited syndrome there.

Q In other word, he is normal?

A Genetically, according to those tests, Yes, Sir.

Q The inherent chromosomes were normal, is that correct?

A The results of those tests were normal, I don't know if they test every single thing about the chromosomes, but, the results of those tests were normal.

Q Okay. Not a single one of those medical tests indicated any kind of a brain damage, did they Doctor?

A That's right.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER 104 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q You know where those tests were performed?

BY MR. SMITH:

[1505] Objection to that, beyond the affidavit.

BY THE COURT:

Objection overruled.

A It is my understanding that they were conducted at the University of Texas Medical Branch at Galveston.

Q Same place we go back to where we started in 1965, isn't that right, Doctor?

A With this case, that's correct.

Q The first record on Johnny Paul Penry, that is where they started, University of Texas Medical Branch in Galveston, in 1965, is that correct?

A I believe so.

Q And, the first EEG was normal, was it not?

A Yes, Sir.

Q Now, I want to show you what has been marked as State's Exhibit Number 104 and ask you could you look at those test results and see if they do not represent those tests that you just testified to?

A There is a disal one, here as well.

Q What is a disal?

A That would be the Tec Scan.

[1506] Q What kind of tests is that?

BY MR. SMITH:

Objection to all of the tests, Your Honor. Can I have a running exception and objection on that.

BY THE COURT:

Objection is overruled. You can have a running exception.

A Sort of an updated version of the cat scan, as I understand.

Q A little more advanced cat scan?

A Experimental.

Q Would the test results that are reflected here by State's Exhibit 104, represent the current state-of-the-art in medical testing for brain damage?

A I am not a medical doctor, but, it is my understanding that this certainly would be considered the spectrum of the tests they could perform at this time. I suppose there could be something else out there that I am not aware of, but, this looks like an adequate examination from a medical point of view, yes.

Q And, they all show that he is normal, isn't that correct?.

[1507] BY MR. SMITH:

Your Honor, the Fourth Amendment objection and this is the objection that I stated previously.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, 801, 802 of the Texas Code of Criminal Procedure.

BY THE COURT:

Objection is still overruled.

Q Do they all show normal?

A They all show normal results.

BY MR. PRICE:

Offer into evidence, State's Exhibit Number 104.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, I object to these exhibits under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution; under the sections that I just mentioned of the Texas Constitution [1508] and sections that I just mentioned of the Texas Code of Criminal Procedure, under AAACK against Oklahoma, and renew all of the objections that we made to the search warrant that Your Honor ordered.

BY THE COURT:

Objection – State's Exhibit 104 is admitted over the objection of the Defense.

BY MR. PRICE:

Could I exhibit these to the jury, Your Honor?

BY THE COURT:

Yes, Sir.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Doctor, I want to show you State's Exhibit Number 101 (A) which is a report from Dr. Pebbles dated May 19, 1977. I believe that is a report that you previously indicated to the jury that you have examined as part of the record in this case, is that correct?

A Yes, that's correct.

Q I am going to direct your attention first of all, this was made by Dr. Pebbles, on what date?

[1509] A May 19, 1977.

Q Okay. Was this a court ordered, asfaras you could tell from the report, a court ordered examination pertaining to the competency and sanity of Johnny Paul Penry in 1977.

A Yes.

Q Okay. Did Dr. Pebbles, in this report, find him both sane and competent to stand trial at that time?

A Yes.

Q I am going to ask you to further read to the jury, first sentence in the last paragraph, on that Page 3.

BY MR. SMITH:

Could I see that? I don't have a copy.

Q Would you read that sentence to the jury?

BY MR. SMITH:

I object, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

On the grounds previously stated with regard to the lack of basis for the opinion on dangerousness.

[1510] BY THE COURT:

Objection is overruled.

A Dr. Pebbles says, "It is my further professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons."

Q Is this on May 19,1977, is that correct? That's Correct.

A And, if the evidence in this case shows that shortly after this report, that Johnny Paul Penry was convicted of rape, sent to the penitentiary and then, a little over two years later, in 1979, he was released and then, approximately sixty days after his release, he murdered and raped Pamela Carpenter, would you say that prediction of Dr. Pebbles pertaining to him being dangerous to other people was true?

A Yes.

BY MR. SMITH:

Same objection.

BY THE COURT:

Objection overruled.

BY MR. PRICE:

I will pass the witness.

[1511] REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Dr. Price, you remember that Mr. Price asked you some questions about anti-social behavior? You remember that?

A Yes, I do.

Q Do you have an opinion of any kind, Sir, as to whether brain impairment or mental retardation are a substantial part of the cause of Johnny Paul Penry's anti-social behavior?

A Yes, I do.

Q What is that opinion?

A I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry.

Q And, the usual case of anti-social personality disorder, Sir, is that true?

A No, it is not true.

Do most anti-social people have brain problems or not?

A There is a lot of speculation about the case of anti-social behavior, but, typically, they are considered to be individuals of average or even sometimes above intelligence, that do not [1512] have brain impairment.

Q I think you told Mr. Price, Sir, that you had the experience of dealing with people who are not motivated when they take the Halstead Test. Did you have this experience this time?

A Not at all.

Q Did you find him to be motivated?

A Yes, Sir.

Q Let me turn to this subject of faking, Doctor. I covered it on direct examination, but, Mr. Price talked so much about it, I want to go back to it. Tell us again, wholly and clearly exactly what you did as to testing whether Johnny Paul Penry was faking.

A Well, in the first place, as we went over in cross examination, in cases like this, it would be a kind of suspect suspicion, and the one that conducted this sort, or any sort of examination within a case such as this, would have to be conscious of the possibility and I looked at three different areas to determine if he was faking or if stated another way, malingering, which is looking like you have a mental disorder that you don't have. I chose three [1513] different areas to examine to see if that was the case. First, was to review previous psychological and psychiatric evaluations and typically, if somebody is a malingerer, they are faking, they don't have a record like this, they don't have test and evaluations going back to the age of nine. They are fine.

Q Not too many nine year olds fake their tests, is that correct?

A It is not likely they fake it to look bad, no.

Q Go ahead.

A And, you see, if it is a malingerer, they don't have any of the signs until they are charged with the offense, and then, all of a sudden, very suddenly, they develop a mental disorder, and that is one of the clear cut clues of a sudden onset. If it is a gradual onset or you have an onset that goes back before the date of the offense, it is less likely that the person is faking and that was the case here, that there were examinations from the age of nine that indicated brain damage and mental retardation. The second area, is to observe the person [1514] during the testing as we talk about, people that are faking, typically, they don't fully cooperate they quit some are even hostile. I have had them walk out of my office and say they are not going to do this any more, so, that they are non-cooperative and if they are going to fake and continue, they don't – you can tell they are not putting forth their full effort, because they will stop in the middle of a task, if it is a paper and pencil test that we sometimes use, and they will just fill in the answer randomly just to get it overwith. The sign of faking is non-cooperativeness. I did not see that in this case. While he would work steadily, though, in effect, his strategy on many of the tests, were measuring brain functioning, he responded to the fact that if you do one well, it seems, a lot of people do, really get caught up in the task and they actually seem to enjoy them. So, there is the behavioral observations that he was cooperative. The third area is to analyze the pattern of the

test results, and if somebody is faking, they fake what they perceive the disorder to [1515] be, they don't really know, so they have an idea in their head, what it would look like. So, they are inconsistent, they seem to miss some items or get the harder items right or they do like in the Halstead Battery two tests that measure very similar functioning, the speech/sound test and the other one is a rhythm discrimination test. So, they will do maybe poorly on one of those and real well on the other. That is inconsistent. You don't see that with brain impaired people, they do poorly on both of them, so, they are inconsistent. If they are fakers, they are inconsistent. I didn't see that in this examination. There is also certain test that fakers tend to do poorly on when they are trying to fake having brain impairment. They tend to do the finger tapping and grip strength and also, the sensory perception, touch and vision, and those with true brain impairment score the lowest on other tests that measure attention, concentration, higher order processes, like when it comes to logical analysis, and they do the best of those other tests. So, this [1516] is a really interesting approach to discrimating fakers from those that have brain impairment, and, in fact, the test that was the lowest for Johnny Paul Penry were those concerning category attention trial tests, textual performance test, those involving attention in concentration logical analysis and his highest scores were the performance, was to the sensory perceptual exam, and after that, the next highest is finger tapping and grip strength. So, he has the patience of an individual with brain impairment rather than that of a malingerer, and then, a third thing, in terms of pattern present them a task that is real easy, tell them that it is hard and you are

actually faking to see if they will fake and if they do, really poorly, on this fairly easy task, the fifteen item test, then, that is a sign that they are intellectually trying to do badly, or fake, and he did not do poorly on that. Those are the things that I was particularly interested in in terms of a determination if he was faking or not.

Q Mr. Price, asked you specifically, about that puzzle, textual performance test, and he said, [1517] he suggested to you that maybe eleven minutes the first time, fourteen minutes the second time indicated faking. Which hand did he do it with the first time?

A His right hand.

Q Which hand did he do it with the second time?

A Left hand.

Q Does the eleven minutes the first time and the fourteen minutes the second time, does that indicate faking to you?

A No.

Q How long did he do it in the third time, when he had to use both hands?

A It was like four minutes.

Q Does that indicate faking to you?

A No, That indicates that there was some transfer and some ability to learn there, and that if he was faking he would have even probably taken longer on the third trial.

Q Now, Mr. Price asked you about the judgment call, whether your bias effected your judgment in scoring this test, do you remember that?

A Yes, Sir, I do.

Q Just, Doctor, this may take a minute, but, you say that you gave him nine tests?

[1518] A Yes, that's correct.

Q Just tell us one at a time what those nine tests were, what kind of results you got and what kind of a judgment you had to do on each of those nine tests?

A The nine tests in the Halstead/Raycon Battery, that I administered, the first is the Afasia Screening Test, which is the one that most depend upon their ability to understand and use language functioning. Also involves some test for Afasia, which is how they draw things, copying something that they don't turn the things upside down or grossly distort them, and, that is a test where you either get right or you don't. It is not a test where there is a lot of ambiguity. Also, if you see any signs on this test, is pretty clear that something is wrong in the brain, because it really, again, it actually is a pretty easy item, and they either get them right or wrong, there is no gradation of scoring.

Q Give us an example of one of those easy items?

A You show them a card that has a cross drawn on it, and you say, draw this and they have to draw it and you say, now, tell me what this [1519] is, now, write what this is and you are getting at something really very simple, and it is either right or wrong.

Q Either he draws a cross or he doesn't draw a cross, right?

A It could be grossly distorted, but, if it looks basically like the cross on the card, you count it right.

Q Okay. Go ahead.

A Another item on the Afasia Screening Test are like that, as well, they are relatively simple either/or.

The next test that I gave was the Sensory Perceptual Exam which is one of the most subjectively, it is a test that takes the most skill to administer, and involves things like you have them close their eyes, and if you touch them on – on some finger, either on their right hand or their left, and they are suppose to tell you if it is right or left, and also, that you number the fingers, and they have to tell you if it is the thumb, first second or third finger, and also, make a very slight kind of a snapping sound in their ear, and you ask them to tell you if it is right [1520] or left and then, you go and alternate these and you can do it any way you like, but, you are alternating them and then, you also have sound in both the ears, at the same time, and if there is a problem there in that level of brain functioning, and often times they don't hear it in terms of simultaneous presentation and they will say either right or left. Also, involved in that is to see if there is a sealed cut in terms of their vision. If they can see in terms of – , so the administrator of the exam is just doing those things with the individual. His performance on that test was adequate, it was perfectly normal, I think there was one or two areas but, that was not enough to indicate that that was an abnormal performance.

The speech/sound perception test, and the rhythm discrimination test are presented on a tape, it is a cassette, you play it for them, and in the case of the speech/sound perception, thee is a sheet in front of them and they are suppose to identify the sound that they hear by taking a pencil and under-lining on the other one, which is the rhythm [1521] test, it had two series – had patterns on the test, where it is sort of like a patterned bench, and you have them tell you if the new patterns are the same or if they are different, and they say, same, you mark down same. If they say different, you mark down different. This is for the ability to concentrate and the ability to stay on a task for the time period that it takes, and the answers are either right or wrong, so it is in terms of the scoring it is objective.

The next test was the hand dynamotor which is a grip strength, it is a apparatus, with the right hand and the left, squeeze it as hard as you can and look at it. This is another indication where you can see if there is – they are trying hard but you don't know, you have them hold it, down and squeeze it and then hand it to you and you record actually the kilograms that they are able to pull on the apparatus or squeeze and you alternate hands to see if it is consistent, and remember the left side of the brain controls the right side of the body, and also, the other test similar to that with an apparatus that they [1522] tap as fast as they can with either hand and I present a number of tasks with each hand. You do this three to five times with each hand and average them.

The trails making test, sort of like a dot to dot test, and if you could see if they sequenced things, keep it right or the first part is relatively simple, just strictly

numbered parts, alternate numbers and letters from a to a, 1 to 1, or b to c, and you time them on that to see how fast they can do it and your right down the times.

Textual Performance Test is one I had in Court, and I showed you the puzzle, where you blindfold them again, you observe them to see if they are continuing to try without just setting there and after that, you time it and the score is timed, and afterwards, you give them a piece of paper and say, draw me if you can, you count the number on this fan, and its either right or wrong, the location score.

The final test in that battery, is the category test, which is a – it is a series of acts, that you present them with different patterns and they have to figure out the [1523] pattern and tell you if it goes through each of the sub-test, and an answer, is either right or wrong, and you told them that's right or that is wrong, and the idea is that they learn from feedback and pick whether the concept was either right or wrong, so, the scoring of these tests, is objective.

Interpretation, there are guidelines and rules and certain patterns of scores are very clear and very incompetent neuro-psychologists would come up with the same interpretation. There is a cut-off, a person is either brain impaired or they are not. Those involving interpretations are more subjective or in cases where you have some process that is going on that is effecting one part of the brain, like a tumor and that can be subjective in terms of interpretation there, to try to decide where the tumor is. Those are the test results.

There was another on subjective interpretation in the case where these results, because of the brain damage, is generalized. It is not any particular area, several areas of the brain, and the interpretation is not as subjective as it would be if there was a tumor [1524] or some other gradual onset kind of dimensional and some that are not difficult to make an interpretation of the test results, and, that that interpretation would be subjective, you have to take a guess, and that has happened in cases, a diffused type of brain impairment, such as this interpretation is not so contested.

Q Doctor is there in your judgment any substantial likelihood that a different examiner with a different bias could reach different conclusions from the test that you gave?

A Not if he is competent, no.

Q And, you testified for the State, sometimes, in criminal cases?

A I have, Yes, Sir.

Q And, if you were doing these tests for the State, would you do it the same way you did do it?

A That's correct.

Q Now, I want to talk about this subject of IQ. Before I get to IQ, I want to take you back briefly to the medical records. You remember that exhibit had an EEG and all of those things? Do those test results change in any way your opinion that Mr. Penry suffered [1525] some brain impairment?

A No, it did not.

Q Why not?

A Those tests are intelligence tests. I have actually, as he pointed out signed an affidavit in this case asking for those tests to be done. They are, and they are increasingly being better, like every task, whether it is neuropsychological or medical, they don't show everything, and those tests are for determining brain damage, that has resulted in brain dysfunction, and it is a – thing, there is brain damage that showed up, brain impairment, and if there is something that takes up space in the brain, a tumor, if there is a hole in the brain, sort of like an absess, and on some of the other ones that are more experimental theory, lets get to the cat scan, if it is a metabolic disorder if a person has some type of infectious process that is taking place, those are intelligent testing and they are getting better.

Asfaras pointing to a particular part of the brain and saying there it is, there is something taking up space, there is also, [1526] if the brain is swelling, they are especially useful in an injury. That's why many times, when you have an automobile accident, and they had to do these types of tests if you had a head injury, they are especially helpful with the current injury, because they are excellent and cite exactly what it is, and help in the medical management of the patient. Those tests are like the others, no matter what kind of test they are, some things they are not good for, and I would always like to see these in any type of evaluations, that they are not good for identifying injury that took place a long time ago, or some kind of a process that took place years ago, not good for identifying generalized brain damage. The process is a loss of neurons, and there is a procedure

called sheering, that the brain is – it is pulled over to one side, and underlying pattern, not in one particular place but over a larger section of the brain. Those medical tests are not good for those kinds of brain damage, and that is why they didn't show anything in this case, in my opinion.

Q Now, I will ask you about IQ. Mr. Price, [1527] mentioned IQ scores to you on your cross examination. Did he mention all of the IQ scores that you have seen for Johnny Penry? Do you remember?

A I don't really remember if he did or not.

Q What I want to know, just so nobody gets fixed up, I am going to try to write down the results of every IQ test that this guy ever had asfaras we know. I want to show them to you and see if they are consistent with your testimony.

A Okay.

Q Now, first, let me show you a document that I am not sure that you have seen before. You have seen Defendant's Five in evidence.

A This is a letter from the principal of an elementary school, and it is not – it was not in my file.

Q Okay. But, that is in evidence. May I have it back?

A Yes.

Q And, that letter is dated in 1965, and it says, "Scored about 60 IQ on test administered by Cameron McKinley-about two years ago," before 1965?

A 1963.

[1528] Q Okay. 1963, about sixty?

A Yeah.

Q Is that consistent or inconsistent with your conclusion that Johnny Penry is mentally retarded?

A That is consistent.

Q Now, you have a document, I believe, dated August 25, 1965, You have that psychological report there?

A Well, actually, all of the file that I had, are now placed in exhibits, but, I have those on a piece of paper, so, I can still follow this without having the document.

Q He took it away from you, but, you remember?

A Right.

Q And, on August 25, 1965, –

BY MR. PRICE:

I am going to object to that last comment. It is in evidence. BY MR. SMITH:

I didn't mean to suggest anything Mr. Price.

BY MR. PRICE:

If the witness is offended by me taking his records away from him, Lord, I got all kinds of records over here, I [1529] would love for him to take them back to Dallas.

BY THE COURT:

He has enough records, let's proceed.

Q Now, in 1965, try to do this so everyone can see, try to write legibly, which I very rarely do. In 1965, there

was a verbal and a performance and an overall score, right?

A Yes, that's correct.

Q Okay. I am going to write up here, "V" for verbal, and "P" for performance, okay? Can you read my writing?

A Yes, Sir.

Q Does my "P" show signs of brain damage?

A It might.

Q Thank you.

BY MR. PRICE:

At least impairment.

Q What was his verbal score in 1965?

A 72.

Q Okay. And, what was his performance score in 1965?

A 47.

Q And, what was the full scale score in 1965?

A 56.

[1530] Q And, that is consistent or inconsistent with your conclusion that Johnny Penry is mentally retarded?

A Consistent.

Q Okay. What is the next IQ score that you are aware of?

A 1968.

Q 1968? We have got a twelve year old now, correct?

A Yes, that's correct.

Q And, we have a verbal there?

A Yes, 55.

Q 55. What is the performance score?

A It is also 55.

Q And, what is the full scale?

A It is 51.

Q And, someday, not now, because it would take too long, to explain to me how a professional averages 55 and 55 and gets 51?

A It is not an average, it is a different set of forms for the full scale IQ.

Q Okay. But, what happens?

A I have seen that happen before.

Q Does that happen sometime? And, what is that consistent or inconsistent?

A That is consistent.

[1531] Q With your view that he is mentally retarded?

A It is consistent.

Q Okay. What is the next time, asfaras you know, that anyone ever gave him an IQ test or give him any kind of an IQ score?

A 1973.

Q Well, before you get to '73, let me show you Defendant's Exhibit Seven already in evidence, a copy which is dated June 10, 1971. Have you seen that before?

A Yes, I have.

Q And, what is that?

A This is an educational prescription that I believe was from the school.

Q Does that say anything about his IQ in 1971?

A Yes, it says that the results were generally in line with his measured IQ of 51, which they actually obtained from doing a chronological age, comparing his mental age, and as a result with have a general IQ score there of 51.

Q So, they did some kind of a process that they said was consistent with the 51 IQ?

A That's correct, yes.

Q They didn't do a separate IQ test, but, they took a look and looked back and said it looks [1532] consistent with the 51 score in 1968?

A Yes, that's correct.

Q Okay. Tell me again where the cut-off for mental retardation according to the standard case?

A It is 70, is the cut-off.

Q Now, will you tell me about this 1973? In 1973, there are a few different documents there.

A Yes, these were – it was the first set that came from the school system, the Goose Creek Independent School District.

Q Okay. Documents there dated January 23, '73?

A January 23, of '73, overall IQ was less than 50.

A Okay. Gave him some kind of a test in Goose Creek, then, in January of '73, came out less than 50, right?

BY MR. PRICE:

Could I see that document, please?

BY MR. SMITH:

That is Defendant's Exhibit Number Three in evidence.

BY MR. PRICE:

Could I see it?

Q If it had showed something less than 50, –

[1533] A Less than 50.

Q Get the idea?

A Yes, Sir.

Q And, then, you have an IQ of some kind of IQ test in September of '73?

A Yes, Sir, the Austin State Hospital.

Q At Austin?

A Yeah. They did a short form of the IQ test and said that the IQ was approximately 50.

Q Okay. About 50. And, then, in October of '73, did they do another one?

A Yes, that was at Rusk State Hospital.

Q Okay. That they gave a verbal and performance in a full scale, right?

A Yes, that's correct.

Q What was the verbal?

A The verbal was 50 – 69.

Q 69. What was the performance?

A 74.

Q And, what was the full scale?

A 63.

Q And, was that consistent or inconsistent with mental retardation?

A That is consistent.

Q Okay. Now, in November of 1976, did somebody [1534] test him again?

A Yes, that was MHMR in Deep East Texas.

Q And, what score did they get there?

A They gave a Stanford-Binet, which is the other major IQ test, and came out with an IQ of 43.

Q They said that was 43, and they said that was low?

A They said that they felt that was another estimate of intellectual ability.

BY MR. PRICE:

Where is that document? Where did you get that document from?

A Also, that one goes back to – I don't know the Exhibit Number, on the MHMR.

BY MR. SMITH:

You may put it in, probably. Alright, under estimate next to the 43.

BY MR. PRICE:

Specifically it says, "This appears to be an under estimation of his ability."

BY THE WITNESS:

Mr. Smith, let me write under estimation or under estimate.

BY MR. PRICE:

Doesn't matter.

[1535] Q Okay. Okay. And, is that consistent or inconsistent with mental retardation?

A It is consistent with mental retardation.

Q Even if 43, is an under estimate he is still retarded, is that correct?

A Yes, that would be correct.

Q Then, was he given a test in 1978? I forgot to write down 1976, year here.

1978, did they give him a test?

A The next one I have is 1979, I think from the TRC, that is what I have on here.

Q What is the exact date?

A 9/18/79.

Q Okay. That is a typo here in 1979. What was the verbal score in 1979?

A 56.

Q 56. What was the performance score?

A 72.

Q 72. What was the full scale?

A 61.

Q Okay. And, you did a test in 1990, right?

A Yes, that's correct.

Q What were your results?

A The verbal is 63.

Q Okay.

[1536] A Performance 66, full scale is 63.

Q This man ever in his life, asfaras you know, have an IQ test that didn't show him to be retarded?

A No.

Q Okay. Dr. Price, one more time. What was the purpose for which you examined Johnny Paul Penry?

A To determine if there was a presence of mental retardation and/or organic brain damage, and if so, to what extent.

Q And, tell us one more time, what you found?

A Found that he has organic brain damage, and as a result, brain impairment, which because it started so early in childhood, this diagnosis of retardation.

Q And, Mr. Price, showed you a lot of documents that he asked you whether you had seen and you said you hadn't, seen them. Now that he has shown them to you, is there anything from the test, any doubt whatsoever on your conclusion?

A No, there is not.

BY MR. SMITH:

Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q When did you look at the documents?

[1537] A Well, I didn't look at the documents. He asked me if there is anything that I have seen that would change my opinion.

Q But, you haven't seen them yet, have you?

A All the documents that were introduced into evidence, I have not reviewed.

Q Right. So, the answer to that question that he asked you, just like the rest of them, go around it?

BY MR. SMITH:

Your Honor, I think the question that I asked was about the documents that Mr. Joe Price showed to Dr. Randall Price.

Q Which ones did I show you?

A Well, you had me read certain things out of certain documents.

Q Well, the jury is here, they know what you saw.

A Yes, Sir.

Q But, you are not trying to tell us that you looked at all of those records, are you?

A Just the parts that you showed me.

Q You are also not telling this jury that – lets just assume for a minute that he is mentally retarded, mildly retarded, that is what you [1538] diagnosed him, mildly mentally retarded, don't you?

A Yes that's correct.

Q You don't have any problem with that one, do you?

A No, Sir.

Q Okay. And, lets assume that there is some sort of a brain impairment there or organic damage that has caused this mild retardation, okay?

A Yes.

Q That is also you testimony isn't it?

A Yes.

Q And, you are not telling this jury as an expert in your field, that there is any connection between that mental retardation and organic brain damage and the murder and rape of Pamela Carpenter, are you, Dr. Price?

A Not a direct type of connection, no.

Q Right. The only connection as I recall, you said the other day was to lower a person's frustration level or something like that, is that right?

A There are several functional limitations.

Q Frustration was one of them?

A Low frustration tolerance is one.

[1539] Q Okay. Did he get frustrated during that eleven hours of you doing all of that testing and everything?

A Several times.

Q But, he didn't attack you with a pair of scissors, and kill you with them did he?

A Obviously not.

Q Did he attack you at all?

A No Sir.

Q I see. He maintained control around you, didn't he?

A Yes, Sir.

Q He can control himself when he wants to, can't he, Doctor?

A He did then.

Q Okay. Do you have any reason to believe he couldn't at any other time when he wanted to?

A Well, I could see circumstances where his ability would be less than someone without brain impairment, but, he controlled himself around me.

Q Okay. Eleven hours worth of testing and conversation and everything else, he controlled himself, didn't he?

A Yes, Sir.

[1540] Q Pamela Carpenter would probably be one of those situations that you are talking about where he might not control himself, you would probably agree with that, wouldn't you?

A Yes, Sir.

Q Have you seen his confession?

A No, Sir.

Q Do you know anything about how that murder occurred?

A Yes, Sir.

Q You do? Where did you get the information?

A From Time Magazine from articles that I am aware of, the facts of the case.

Q You are aware that he, – well, are you aware about the facts of the case?

A That he raped and killed the victim? That's what he confessed to as I understand it.

Q What else? How did he do it?

BY MR. SMITH:

Your Honor, I don't see that this bears any weight on the expert's testimony, here. He is just attempting to repeat certain things to the jury.

BY THE COURT:

Sustain the objection.

[1541] Q You said earlier when he asked you a question, about motivation, your response was in regard to Mr. Penry when he took this test of yours, he was motivated, is that correct?

A Yes, Sir.

Q Could have been motivated to malinger, too, couldn't he?

A Yes, Sir.

Q In fact, someone that is facing the possibility of a death penalty, it would be logical to assume that they would be motivated to malinger in that type of a situation

BY MR. SMITH:

My only objection is that he has been asked that at least five times.

BY THE COURT:

Let him answer it one more time.

Q Would that be logical to assume that they would be strongly motivated to malinger?

A Seems to me that the would be.

Q You have him drawing a cross. It would be very easy to for him to draw a circle instead of a cross, wouldn't it?

A He did the cross pretty well.

Q And, you talked about judgment calls, that just [1542] kind of brings something to mind. You said one of the examples that you gave this jury was drawing a cross, and you showed him a cross and then, maybe he would draw one like it?

A The cross is like this, it has that appearance it is important.

Q What you mean like this?

A That is approximately what we asked him to do.

Q Okay. But, then, if he draws it like this, and you are the testor, and you are biased, and you are there to achieve a result, you can call that an "x" if you want to score him low or you can say well, he is a little, just a little bit off center, that is really a cross, so, I am going to give him a score for it, couldn't you?

A That would be wrong if he drew the cross like that.

Q If you draw it like that, it wouldn't be called a cross?

A No.

Q You would call it an "x" is that what you would call it?

I guess if I draw it that way, that would be a case of mental retardation or something?

[1543] A If I saw other signs like that, it would be an indication of brain impairment.

BY MR. SMITH May we see what you showed the witness, Joe?

BY MR. PRICE:

(Handing.)

Q Definitely, some areas that are up to the testor, up to interpretation, is it not?

A Interpretation and experience in administering the examination.

Q And, these medical test that we talked about a while ago, you thought that they were important enough in April that you signed an affidavit stating that they were absolutely necessary in this case, didn't you?

A Strongly recommended that they be conducted.

Q Right. Signed an affidavit under oath to that effect, didn't you?

A That's correct.

Q Now, you are telling this jury, they don't mean anything?

A No, I am not going to say that.

Q Well, I kind of heard that a while ago. Maybe I misinterpreted what you were saying. They [1544] still important aren't they?

A Yes.

Q They don't agree with what your findings are though, do they?

A They don't show what I found.

Q And, this tests, this neuro-psychological whatever kind of test it is, it isn't – it is sort of locate and pinpoint the area of the brain where the damage is?

A Sometimes it can.

Q Isn't that – not sometimes, isn't that what it is suppose to do?

A Unless there is no particular area of the brain that is damaged, and the damage is over a lot of the parts of the brain, it is generalized damage that is what the test shows.

Q Normally, that test will isolate and point out the specific portion of the brain that is damaged, would it not?

A Well, I can point out parts of the brain that are damaged, from this test, but, in his case, there are several parts to the damage.

Q The whole brain, then, is that what you are saying?

A Several parts. The damage is spread it is [1545] diffused it is generalized.

Q Tell us what parts are damaged to Johnny Paul Penry's brain?

A The cortex.

Q Where is that?

A The outer part of the brain.

Q The entire outer portion of the brain?

A No, the entire brain is not damaged. The damage is spread out over different parts of the brain.

Q What is the cortex? I don't know what the cortex is.

A Cortex is the outer portion of the brain, the portion of the brain that is different in humans, than other animals. Our cortex is thicker, no intellectual function.

Q The front, back of the head, either side, on top, where is it?

A Yes, all of those.

Q All of those?

A Yes.

Q So, basically what you are telling us, the whole brain, the whole area?

A There is damage spread throughout the cortex but the sub-part of the structure, don't show any impairment. There are parts of his brain [1546] that are functioning perfectly normal.

Q On the inside?

A Yes.

Q But, all of the outside of the brain is damaged?

A I'm not saying that. I am saying that the damage is spread out over the outside of the brain in different parts.

Q So, spread out and so hidden that not a one of these tests could find it?

A That's right.

Q And, these tests, one of them measured the brain waves, the electrical wave that goes through the brain, doesn't it?

A That's right.

Q That is the EEG?

A Correct.

Q Okay. What does the cat scan do?

A The cat scan takes x-rays of the brain at different slices, or at several sections of the brain, throughout the brain, not just the cortex, but the sub-cortex structures as well.

Q It measures in slices of the brain throughout does it not?

A That's correct.

Q That's correct. What does the pet scan do?

[1547] A The pet scan measures the way the brain is using energy and it is a metabolic activity of the brain.

Q Okay. That is a different function of the brain all together?

A Yes, that's correct.

Q That it measures? Okay. What is the other test that was done, MRI, that's what it was?

A Right.

Q What does the MRI do?

A Well, it also, proves the injection of radio – it also has a picture, it has a result of getting an image of the structure of the brain.

Q The whole brain?

A Whole brain.

Q Cortex and all?

A Cortex and all.

Q Just like the cat scan, also, when it slices the brain and gives us individual sections, it gives you the cortex in that area, does it not?

A Yes.

Q No sign on either one of those test, that there was any adnormalities, here was there?

A That's correct.

Q And, then, the genetic test there that has to [1548] do with inheritance and chromosomes, does it not?

A That's correct.

Q And, he is normal on everyone of them?

A That's right.

Q Did I understand you correctly on indirect examination just a few minutes ago, to say that brain damage is a cause of anti-social personality?

A I said that can be one contributing factor, to anti-social behavior.

Q You didn't say it was a cause, now, of anti-social personality, did you?

A What I just said, it could be a contributing factor in some cases, to anti-social behavior.

Q Can you tell us some of the authority on that subject, that backs you up in what you just said?

A Well, it would be, if you took a look at the –

Q I'm talking about recognized authorities in your field that have written books, papers or anything else that says what you just said?

A There are some. There are, in fact, some articles published about that. I don't have the authors memorized on that.

Q That says that brain damage is a contributing factor, in effect, is one of the causes of [1549] anti-social personality?

A It may be contributing to anti-social factor.

Q Maybe, it is?

A That's what I said the first time.

Q Maybe is what you said?

A Yes.

Q Maybe it is a contributing factor. You are not telling this jury that it causes anti-social behavior are you?

A In this case, it is a contributing factor.

Q How do you arrive at that?

A That, it leads to some of the same behavioral traits that you will find in DSM-3 that describes anti-social behavior that brain damage can lead to some of the traits, it can lead to apparent anti-social behavior or frustration tolerance, impulse control problems or judgment. So, correctly, it can lead to it.

Q Indirectly could lead to it?

A Not, directly.

Q Can you cite me one book, one authority, one article, one periodical anything that says what you are saying up there on that witness stand as testifying under oath to the jury, is true?

A I can't off the top of my head, give you a [1550] citation. I do have some on that.

Q Don't you think that is all important in this case in particular?

A It seems logical to have it as indirect association as well.

Q But, you don't have any of the articles and don't know any of the authorities?

A That's what I said, yes.

Q I guess we can get the court reporter to read it back, but, you sure didn't say on redirect examination that the soci-pathic personality of this Defendant was caused by mental retardation and brain impairment, in your opinion?

A Well, as I recall, I said in this case, the organic brain impairment and mental retardation are contributing causes of his anti-social behavior. You can have him read it back, but that's what I recall I said.

Q Anyway, we are clear now, you are saying that it is a contributing cause?

A there are other causes.

Q What are those causes?

A The way the person is brought up, their family background.

[1551] Q The way a person is brought up can cause them to have anti-social personality?

A In terms of their values, there is.

Q Dr. Price, I am not asking you about some of the traits. I know that you like to use the word traits, indigitive of or indicators or whatever, but, I am asking you somebody that has an anti-social personality, diagnosed, just like Mr. Penry has been diagnosed over the last fifteen years as being anti-social, someone is diagnosed as anti-social, what are the causes of that?

A They don't know for sure.

Q Alright.

BY MR. PRICE:

I will pass the witness.

BY MR. SMITH:

No questions Your Honor.

BY THE COURT:

You can step-down, Dr. Price. Would you all approach the bench just a moment. Do you have any other witnesses?

BY MR. SMITH:

No other witnesses, Judge, but, we have some exhibits. Take a short break.

BY THE COURT:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[50:1610] DR. WALTER QUIJANO

called as a witness on rebuttal by the State, having first been duly sworn to tell the truth, testified on his oath as follow;

DIRECT EXAMINATION

QUESTIONS

BY MR. PRICE:

Q State your name for the jury, please, Sir?

A My name is Walter Quijano.

Q Where do you live, Dr. Quijano?

A I live in Conroe, Texas.

Q And, are your a married man?

A Yes, I am.

Q Okay. And, what is your occupation or profession?

A I am a clinical psychologist.

Q And, could you just give the jury a brief summary of your background and education in the field of psychology?

A I have a Bachelor's Degree in Psychology from the University of San Carlos in the Philippines, where I was born. I have a Masters' Degree in Clinical Psychology from the University of Hawaii, and then, a Doctors' Degree in Clinical Psychology, also from the University of Hawaii.

I completed the required clinical psychology internship by the American Psychology Association. [1611] I am licensed in the State of Texas with the highest level of licensing that is the Health Service Provider.

I am also licensed in the State of Oklahoma and Nebraska, where I used to work

My work expereience includes being a psychologist – staff clinical psycholigist at the Federal Prison in San Madro, California. I was staff psychologist doing chemical abuse treatment at TDC in '75, 1975. I was forensic psychologist at the State Hospital in Nebraska. I was Chief Psychologist at a State Hospital in Oklahoma, where I did work with the forensic program, working with prisoners as well as doing competency and insanity evaluations.

I have worked in the private setting, including work with drug abuse programs. In 1984, I was called by TDC again to be Chief Psychologist for the entire system, where I stayed until last year.

Since then, I have been in private practice, and my work includes, clinical cases, patients, that I see in my office, I teach at the University of Texas Medical School Family Practice Residency Program in Conroe, Texas.

[1612] I do some clinical work in the Montgomery County Jail. I do competency and forensic and other consultations with the District Courts in Montgomery County. I have done similar work in Harris County, Lubbock, Dallas, did my most recent one, I consult with the Texas Rehabilitation Commission in screening applicants who are cliaming mental retardation or mental illness, in applying for benefits.

That is my work history.

Q Back in 19 – did I understand you correctly, from '84 to '89, you were clinical psychologist for the Texas Department of Criminal Justice?

A Yes. I was Chief Psychologist then.

Q The Chief Psychologist?

A Yes.

Q And, prior to that, you worked in a hospital in Oklahoma, is that correct?

A Yes. I was Chief Psychologist there also.

Q What type of hospital was that?

A It was a State Hospital and we took care of a third of Oklahoma. First, all of the mentally ill inmates in the Oklahoma prison system was sent to us for treatment. We also did all of the State's competency and insanity evaluations.

[1613] Q Okay. You don't look old enough. When did you first start working as a psychologist?

A Oh, 1975. August 5, 1975.

Q Have you written any types of periodicals or articles or any kind of publications in your field?

A I have written a few publications. I want to write more, there is no time to do it. What I have done instead is make sure that on an almost annual basis, that I try to be present in professional conferences.

Q Have you been called in on professional conferences and seminars and things of that nature?

A Yes, I have.

Q And, would you be teaching other members of your profession in that area?

A Yes, I do.

Q What professional associations do you belong to?

A I belong to the American Psychiatric, – American Psychological Association, the Texas Psychological Association, the Association of the Advancement of Behavior Service, and the American Service of Correctional Psychologists.

[1614] Q And, I believe that you have already indicated to the jury, that you are licensed in your profession in three states, Texas, Nebraska, and Oklahoma, is that correct?

A Yes, I am.

Q Have you had any prior experience in working with the mentally retarded?

A Yes, I have.

Q And, what experience have you had in this field?

A Part of my doctor's training, I was assigned to a home for the mentally retarded in Pearl Harbor, particularly in Oahu in the State Hospital. I had occasion to work with a few mentally retarded patients who became unmanageable in the State school system

In my work, with the Texas Rehabilitation Commission, one of the most common claims for benefits is mental retardation, and when I was Chief Psychologist in TDC, I was privileged to develop the non-existing Mentally Retarded Offender Program as required by the Federal Court Order.

Q Okay. You actually set up the Mentally Retarded Offender Program inside TDC that is in place [1615] today?

A Not the old one, but, I was a principle figure, I was chief then.

Q Could you kind of tell the jury a little bit about psychology and what you do in your field? What does psychology involve?

A Psychology is really the study of human behavior. They are granted in psychology that studies human nature, human behavior called the basic scientist, and the basic sections are parts of psychology. If you took those bodies of knowledge and added a component of abnormal behavior and used them to recognize and manage or treat abnormal behavior, it becomes what we call clinical psychology, and I am a clinical psychologist. My job is to apply the basic knowledge that we have about human nature and human behavior in the recognition and management of abnormal behavior.

Q Have you performed a competency examination in other words, examination on individuals charged with crime, to determine their competency to stand trial, as well as their sanity at the time of the commission of their crime?

A Yes, I have.

[1616] Q Have you done that on many occasions?

A Sir?

Q Have you done that on many occasions?

A Oh, yes, yes.

Q Generally, have you worked in the criminal justice system for a number of years with respect to people that have psychological problems?

A Yes, I have.

Q Do you know the Defendant, in this case, Johnny Paul Penry?

A Yes, I do.

Q Have you previously had an opportunity to interview the Defendant?

A Yes, I have.

BY MR. SMITH:

Your Honor, at this time for the record, I am renewing an Estelle vs. Smith objection.

BY THE COURT:

Overrule the objection.

Q When was that interview?

A I was requested and I complied to examine him in May, 1990.

Q And, how long did that interview last?

A About two hours.

[1617] Q Okay. Who was present in addition to you and the Defendant, Johnny Paul Penry?

A It was a strange interview, because I normally interview people, -

BY MR. SMITH:

Your Honor, I object to the volunteered comment of the witness as to -

BY THE COURT:

Restate your last statement. Disregard the last statement.

Q Who was present?

A I was there, Mr. Penry was there, the District Attorney, Joe Price, you were there and the Defense lawyers, John Wright was there.

Q Okay. Is that a little unusual to have the lawyers present?

BY MR. SMITH:

Objection, Your Honor.

A Yes.

BY THE COURT:

Overrule the objection.

A Yes.

Q In any respect you did conduct an interview that lasted approximately two hours, is that correct?

A Yes, I did.

[1618] Q In addition to the interview, have I previously furnished to you certain records pertaining to this Defendant?

A Yes, you did.

Q Specifically, did I furnish to you his records from the University of Texas Medical Branch in Galveston, back in the 1960's?

A Yes, you did.

Q Did I also furnish to you and I will just go down the list and see if I have them all here, is records from the Texas Rehab Commission; his records from the Austin State Hospital; his records from the Mexia State School; his records from Rusk State Hospital; a competency report from the psychologist, Dr. Wendell Dickerson; the Defendant's TDC Medical Records and Mental Health Records; his records from the Goose Creek Independent School District. Did I furnish you all of those records, Doctor?

A Yes, you did.

Q And, I believe I left out one, here. The Polk County MHMR. Did you review those also?

A Yes, I did.

Q In addition to that, Doctor, did I also furnish [1619] you certain documents pertaining to the criminal history and circumstances surrounding the commission of a crime for which this Defendant, is charged?

A Yes, you did.

Q Specifically, were you given copies of the two confessions given by the Defendant in 1979?

A Yes, I was.

Q As well as some offense reports concerning that?

A Yes, I was.

Q And, were you also furnished with certain records pertaining to the Defendant's prior convictions in a case involving a victim by the name of Diana Koch?

A Yes, I was.

Q And, did you review all of those various records that we just went over?

A Yes, I did.

Q Okay. You haven't memorized all of them, though, have you?

A No.

Q I direct your attention back to the interview with the Defendant, in May of 1990, just a couple of months ago. During the course of [1620] that interview, did you have any problems with communicating with him?

A No, I did not.

Q Did you understand what he had to say to you? Were you able to unerstand him?

A Yes, I did.

Q Did he appear to understand you?

A Yes, he did.

Q Did he talk sensibly?

A Yes, he did.

Q Did you detect any type of mental illness, any type of psychological schizophrenia or any other type of mental illness?

BY MR. SMITH:

Objection, Your Honor. It is irrelevant and mitigating facts.

BY THE COURT:

Overrule the objection.

A No, I did not.

Q Did the Defendant appear to be in touch with reality and know what the circumstances of his surroundings were?

A Yes, he was.

Q Based on your interview there during that two hour period, did he appear to be able to control [1621] himself when he wanted to?

A Yes, he was able to.

Q Did his memory seem in tact to you?

A Memory was very good.

Q Dr. Quijano, I want to ask you just generally, first of all, about mental retardation. If you would, kind of generally tell the jury, what is mental retardation, or how does your profession view mental retardation?

A Mental retardation is a condition in which a person has low average, or below average intellectual capacity or intellectual functioning.

Number Two, that a person's adaptive skills the way that he conducts himself, the way he adjusts to his environment, how he survives, might also be retarded.

And, Number Three, that the deficit, either in the intellectual capacity or functioning or the adaptive functioning must originate before age eighteen. If those three components are present, then, a diagnosis of mental retardation may be given.

Q Did you notice in the Defendant's prior records where he had at various times been diagnosed with different degrees of mental retardation?

[1622] A Yes, I have.

Q Okay. And, is it your testimony that there are two basic components of mental retardation, one, is a below average funtioning ability and second, a below average adaptive skills?

A Yes, that is true.

Q Generally speaking, what are some of the causes of mental retardation?

A Well, the cause of types of mental retardation, is complexed and we really do not know what the precise or the exact cause is. Many possibilities. They range from genetic defect –

Q That would be inherent?

A That would be inherited, yes. Can be from trauma can cause the retardation it could be an infection in the brain, and sometimes there is no cause that can be identified.

Q Are there degrees of mental retardation?

A Yes, there are.

Q And,generally speaking, what are those?

A They generally range from mild to moderate to severe, and then, to profound.

Q As you move from mild to profound does the handicap become more increased and more severe?

A Yes, it does.

[1623] Q Generally speaking, what is considered the mild range of mental retardation asfaras IQ?

A Oh, it is IQ in the sixties.

Q A person with mild mental retardation, can they function in society?

A Yes, they can.

Q Are they educatable?

A Yes, they are.

Q Do they have the ability to know the diffenrece between right and wrong?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Same objection I urged earlier.

BY THE COURT:

Overrule the objection.

Q Do they have the ablity to know the difference between right and wrong?

A Yes, they do.

Q Generally, speaking, with respect to mentally retarded people, are they regarded violent or not violent?

A In general, they are not violent.

Q When comparing the mentally retarded to those that are not mentally retarded, how will they [1624] compare with respect to violence?

A The incident of violenct among mentally retarded is not higher than the people who are not mentally retarded.

Q Is it lower?

A I don't know that. I just know that they are not higher.

Q Okay.

A They could be the same or less, but, the incident is not higher.

Q Has there ever been established any type of a scientific causation between mental retardation and specific criminal behavior?

A No, no, there is not.

Q Just because a person in mentally retarded, certainly wouldn't mean that they would automatically be violent?

BY MR. SMITH:

Objection. He needs to let the witness testify, Your Honor.

BY MR. PRICE:

I will rephrase it.

BY THE COURT:

Sustain the objection. Restate your question.

[1625] Q Because a person was mentally retarded, would that neceassarily mean that he is going to be engaged in criminal behavior?

A No, not necessarily.

Q Just likewise, because a person is not mentally retarded, could not necessarily mean that they would engage in any type of criminal behavior?

A That's correct.

Q Do we have tests and ways of measuring mental intelligence?

A Yes, we do.

Q And, what types of tests are used to measure mental intelligence or intellectual ability?

A There are classic tests, or intellectual testing instruments and the one that is most popularly used is the Wechsler, increment. There are three kinds, one for children, one for adolescence, and then, one for adults.

Q Are these commonly referred to as IQ tests?

A Yes.

Q And, in addition to IQ tests, you mentioned earlier, that in order to be classified as mentally retarded, that first of all, that it requires a below average intelligence functioning is that correct?

[1626] A Yes.

Q Is that what the IQ test is, measures the intelligence functioning ability?

A Yes, it does.

Q You also mentioned adaptive skills. Does that have anything directly to do with IQ tests themselves?

A No.

Q What are you talking about when you say adaptive skills?

A Adaptive skills is the way the person performs on very basic functions, such as the ability to care for one's personal hygiene, taking a bath, keeping clean, changing clothes; the ability to recognize hunger and to want his meals, ability to interact socially, the ability to go buy some things in the store; the ability to engage in recreation activities, watch TV go fishing, hunting, horseback

riding; the ability to recognize pain and take care of one's health, take medication if it is called for.

Q Kind of like normal ability to get along in self-functioning?

A Correct. Activities of daily living.

[1627] Q So, the IQ of an individual, his intellectual functioning capacity, is not the only area that you look at in making a determination of mental retardation, is that correct?

A Yes, that's corect.

Q You would also want to look at adaptive skills and that type of thing?

A That's correct.

Q With respect to IQ tests, are there any factors that might influence the accuracy of these tests?

A Yes.

Q What are some of those factors?

A The factors that need to be considered in looking at the velleity of a test are, Number One, of course the errors that are built into the test, that the test is not a perfect test, so there is a built in error.

Number Two, the condition of the test, If the test was administered now with that noise outside, the results can be questionable.

The motivation of a person being tested, his condition, his health, what you want to accomplish out of the test.

There are certain test situations, when [1628] you want to look very good, and there are certain test conditions that you don't want to look very good. The motivation of the person testing, what he is looking for, some answers are on the fence, and one can call it left or right, these are also important.

Those are some of the factors that need to be considered in interpreting IQ test and they have to be considered in order to explain that the testing is not a precise instrument.

Q Will social – or lack of education also effect IQ test?

A Yes. IQ test, althought it is called, or presented as a test of the nature of intelligence, it is really not, It is really, actually a measure of academic skills, what you have learned in school and formal training. So, if a person , educationally deprived, and alot of people are, so, because of family hardships, you have to go to shcool, I mean, quit school because of a personal situation, and that necessarily – that person would necessarily score lower than a person who is "fully and formally educated" but, that does not mean that a person who has no school is dumb.

[1629] Q A person that was uneducated and scored say in the mildly mentally retarded area, does that necessarily mean that the person was actually mildly mentally retarded?

A No.

Q Here, would you also want to look at the adaptive skills of what the person's ability to function in society is?

A Correct.

Q Reviewing the various records, on Johnny Paul Penry did you see where he had been administered a number of IQ tests over the years?

A Yes.

Q And, did those tests generally reflect – place him in the mildly mentally retarded range?

A Most of the test put him in the mild indications. He can go as high as borderline.

Q And, where would borderline be?

A It is between normal and mild.

Q And, that would be roughly on numbers, what would that be?

A In the seventies.

Q Okay. And, mildly retarded would normally be roughly in the sixties down to fifty-five or something like that?

[1630] A Yes.

Q I don't know, you have probably seen this exhibit here. Can you see that Doctor, all of it?

A Yes, I can.

Q Okay. This is a Defendant's exhibit that was introduced Friday, I believe where they wrote down some

of the test that they had seen in the records there. First of all, did you review some of these tests that are reflected?

A Yes, I have.

Q Okay. Can you tell the jury any of the significance of these tests? Is there anything about them that is particularly significant to you?

A Well, first the fluctuation is noticeable and so, one looks at why the fluctuations, and some of the factors that I have already explained the condition, the condition of the person to be tested, the condition of the person testing, have to be looked into, makes one wonder about the instrument used in this particular exhibit. So, the results of IQ testing, using instruments for children, and some are results from using instruments for adults. And, some of these results are [1631] estimates. In other words, the whole test was not given, but, only portions of them.

Q These test back in the 1960's, and up to and through even probably 1971, were those children test?

A Yes, the earlier ones were children's tests.

Q With respect to an adult, where they have a child IQ test, are those considered accurate in later years in determining that person's IQ level, necessarily?

A No. The IQ for adults should be used, measured by adult tests.

Q Okay. So, these test back in '65, UTMB, Calventon or '66, would they be necessarily indigative of his IQ as of – as an adult?

A No, they need to be considered these scores were once upon a time discovered, but they are of historical value.

Q Now, we move down here to about October, '73, and I believe this is Rusk State Hospital Examination. Are you familiar with that one?

A Yes.

Q Okay. Was that an adult test that was given to him at that time?

A Yes.

[1632] Q Okay. And, this 76 here was a very vague reference in one document that said 43, and then, he was under, it was actually under achieving in that one.

BY MR. SMITH:

Objection to Counse's characterization of the document, Your Honor.

BY MR. PRICE:

I am just repeating exactly –

BY THE COURT:

I believe he understands it is an estimate.

Q Under estimates in your opinion? Did you see any back-up for that test in those records or anything?

A Some of the courts that are mentioned in the test of the report, do not have the back-up. It referred to them, but, many of them do not have a raw data that we need to understand the picture completely.

Q In 1979 test are you familiar with that one?

A Yes.

Q Was that an adult test?

A Yes.

Q And, was that given by the Texas Rehabilitation [1633] Commission?

A Yes.

Q Is there anything significant about that 1979 test with respect to his IQ?

A The most striking observation is the performance IQ of '72. By performance, we mentioned intelligence is measured non-verbally. You don't have to use words or language, you use your hands, or you point to certain pictures, and he scored 72, which is the borderline range. It is higher than the mild mentally retarded range.

Q What about this Rusk State Hospital test, is there?

A The same observation, and that is his performance is 74 which is even higher than the 72.

Q Okay. This 1990 test, I believe the evidence has shown, was performed by Dr. J. Randall Price back in June, I believe, while this Defendant's trial was pending. Do you attach very much significance to that particular test?

A Well, the results are, again, places him back to the mild range. It must be pointed out that that test was necessarily after the legal proceedings have started, and one wonders as [1634] as to how much effort was placed

into this test, knowing that there are some gains that can be achieved by not doing as well. So, that testing, 1990, testing, has to be taken in the context of his legal predicament.

Q Based on your examination of the Defendant, as well as prior records that you have reviewed on the Defendant, both with respect to his prior social and educational and criminal history, as well as his prior medical and mental health history do you have an opinion as to the Defendant's current intellectual functioning capacity?

BY MR. SMITH:

Just for the record, I re-urge my prior objection, Your Honor.

BY THE COURT:

Objection is overruled.

A From the accounts that are in the record, and those presented in the exhibits, the Defendant's intellectual capacity is between mild mentally retarded range and borderline.

Q Now, does that necessarily mean in and of itself that he is mentally retarded?

A No, it does not.

[1635] Q Does that or does that not take into consideration his adaptive skills, does it?

A That's correct.

Q Have you reviewed all of his records from that standpoint, to make a determination as to his adaptive skills?

A Yes, I have.

Q And, do you feel that in that area, that he would be functioning in the mentally retarded area, not?

A No, he does not.

Q Does this Defendant have the ability to reason?

A Yes, he does.

Q Does he have the ability to learn?

A Yes, he does.

[1636] Q Does he know the difference between right and wrong?

BY MR. SMITH:

Objection, Your Honor, same objection.

BY THE COURT:

Overrule the objection.

A Yes, he does.

Q And, does he have the ability to control his actions?

A Yes, he does.

Q There has been some testimony, conflicting testimony, some testimony just the same, of possible child abuse where this Defendant was at an early age and have you, in reviewing his records, have you seen some indication of that or some allegations?

A There was some reference to child abuse.

Q Okay. Do you recall where those references of child abuse first really come out in these records?

A I think they emerged around the time that he was in Austin State Hospital.

Q Okay. And do you recall what he was in Austin State – how he got into Austin State Hospital what the circumstances were?

A I think he was sent there after he was charged with or convicted of arson.

BY MR. SMITH:

Move to strike the reference to the Conviction, Your Honor. There is no record of that.

BY THE COURT:

Okay. Sustain that Motion. Disregard the word after he was convicted of.

BY MR. SMITH:

[1637] Move for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q There were some charges of arson involved at that time, is that correct?

A Yes. I am just not sure whether that was one or the other.

Q And, this would have been in what year?

A I don't recall at this time.

Q Okay. But, at any rate, when he went to the Austin State Hospital.

A Yes.

Q Doctor, with respect to child abuse, just for a moment, assuming there was child abuse, has there ever been scientifically any causal relationship established by your profession between child abuse and specific criminal behavior and abuse.

A No, there is not.

Q There is a common understanding I think of most laymen, that, child abuse automatically leads to some sort of criminal behavior in the future, but, are there any surveys that back that up?

A No. The basic research that I referred to earlier [1638] in the testimony is at best, mixed. About a third of the studies show that there could be some relationship, but, the relationship is not caught in a trap, there is a difference between causation and correlation. Causation means child abuse directly caused a, or resulted in the violence. Correlation means that many people who are violent may have been abused as children, but there in no causation, it is correlation. About the same number of studies show that there is no correlation at all and then, another gorup of studies show that people who have been abused as children try their darndest to become model citizens, precisely because they know what it is to be abused.

Q Also, been some evidence, and you probably seen it in the Defendant's records, of some diagnosis or at least

indications of possible brain damage. Have you seen that?

A Yes. There were references to brain damage.

Q Okay. Could you just kind of explain to the jury what is brain damage?

A Brain damage is a physical defect the structure of the brain, in the brain itself.

[1640] Q And, is this the same thing as brain impairment?

A Brain impairment is a little more vague. I would suggest for our purposes here, brain damage refers to physical defect in the structure of the brain itself. Brain impairment may be seen as a defect in the brain's functioning the way the brain works.

Q Are there tests to determine the existence of brain damage?

A Yes.

Q Are there psychological tests?

A Yes, there are psychological tests as well as physical tests.

Q Okay. With regard to psychological tests, could you tell the jury some of those types of tests or a type of test?

A Well, there are individual tests, there are whole batteries of tests. One battery was administered to the Defendant, that is the Halstead-Raycon Battery. Another one would be the Lujon/Nebraska Neuro-Psychological Battery.

Q The Halstead Test, I believe the evidence has shown that Dr. Price also performed this Halstead Neuro-psychological Test. Are you familiar with that test?

[1640] A Yes.

Q And, have you administered it yourself?

A No.

Q Okay. Do you understand how it works?

A Yes. The test is not really one test but, a number of test. I have experienced various portions of it, but, for neuro-psychological test, I use other measures.

Q What do you use?

A The WAIS, the intelligence test, can be used to give some hints. Better result which is a drawing test, the Lujon/Nebraska is another battery. But, I use the Wechsler Memory Scale which measures different kinds of memories. It is a number of ways and finally you look at the person's functioning, better than any other test is how does the person function in real life. That is the best test of all.

Q That Halstead Test, is it designed to locate the area of specific area of the brain that may be damaged.

A It can be used that way.

Q The Halstead test given under circumstances of a Defendant such as Mr. Penry, this case, faced with capital murder charges and indeed, his jury [1641] is being selected during the time that the test is being adminstered, do you feel that that could could cause any problems with respect to the credibility of the test?

A Yes. This test and any other test, he motivation is questionable, the results have to be taken cautiously.

Q What is a MMPI Test?

A MMPI means, Mental Mulitfaceted Personality Inventory. It is a test that can measure different numbers of mental disorders or psycho-pathology.

Q In a situation where you were trying to ascertain the existence of brain damage, or at least the person's mental capacity, an Halstead Test was applied would you also want to apply a MMPI?

A Yes. The MMPI is part and parcel of the battery.

Q Okay. And would the MMPI, what would the MMPI tell you about the individual?

A The MMPI is a very useful test. It is mostly a very popular test. It can tell us a number of things. Number One it can tell us the test taking attitude of the person being tested. If a person is appearing honest, or if a person is what you call faking good meaning looking better [1642] than he is, or faking bad, which is looking worse than he is, then, it can measure a number of disorders, how obsessed the person is to traumatic problems, physical complex, it can tell us about the depression level, t can tell us about the person's acceptance of psycological pressure or problems.

These are people who take psychological problems, inter-personable problems, and treat them as such, people who like to blame it on ulcers and headaches, and neck aches, back aches so on and so forth, concerns us about whether a person has anti-social features. Anti-social meaning just unable to follow rules and regulations and

the ability to learn from punishment experiences and so on and so forth. It can tell us whether or not a person is suspicious or paranoid, is a person obsessed, excessive worried about other things; is a person schizophrenic, or shows some schizophrenic features, and finally is a person very hyper, and finally, that one last component, and this is, a person withdrawn or sociable. Many other applications include degree of substance abuse and many other measures, but those are [1643] the basic scales in the MMPI.

Q If you were giving a Halstead Test to determine the existence to brain damage and to determine the mental status of the Defendant would you thing that the MMPI would also be a necessity?

BY MR. SMITH:

Objection for lack of foundation Your Honor. The witness has never given a Halstead ever in his life.

BY THE COURT:

Overrule the objection, but, you restate the question.

Q You are familiar with giving the Halstead are you not?

A Yes.

Q Have you interpreted many of them in the past?

A The results, yes.

Q Are you familiar with the MMPI Test?

A Yes.

Q Have you given any of those?

A Yes. Yes, I give those routinely for psychological evaluations.

Q Irregardless of whether a Halstead Texas was given or not, would an MMPI be something that you feel like would be necessary to accurately [1644] get a complete picture of a person's mental status?

A It is a very important component, and very useful to me.

Q Okay. One of those things it would determine or give you some help in determine, is whether or not a person has an anti-social personality?

A Yes.

Q Also, understand that it would also benefit in determining whether a person was faking or not, and malingering?

A Yes.

Q Did Mr. Price give an MMPI?

A No.

Q Okay. Did he indicate on that portion of the Halstead whether he thought it was necessary or not?

A No, he just – no indication was that not applicable.

Q But you disagree, you feel that it would be applicable?

A If I were doing the evaluation, with or without the Halstead-Rayoon, the MMPI is a crucial document.

Q You mentioned that these are psychological tests [1645] to determine brain damage. Are there also medical tests that can be performed to determine the existence of brain damage?

A Yes.

Q Specifically, could you tell the jury some of those type tests?

A Well, the most common is the EEG, which measures again the function of the brain, the brain waves. There are normal brain waves and there are abnormal brain waves. When, you have the, for lack of a better term, x-rays of the brain using different techniques. The MRI uses magnification of the brain and the cat scan, which takes actual pictures of the brain.

Q The EEG, you said it measures the brain waves or electrical waves of the brain?

A Yes.

Q The CT, or the Cat Scan, does that actually show slices of the brain.

A Different angles of the brain, Yes, Sir.

Q Does one MRI show the entire brain in the three dimensional form?

A Yes.

Q Are these the most advanced type of test that [1646] exist right at this time?

A Yes, those are the State of the Art, other than autopsy.

Q Okay. And, have you seen reports from the University of Texas Medical Branch in Galveston where this person was given an EEG back in 1965?

A Yes.

Q And, what did that EEG show?

A That report that showed that he was normal.

Q EEG would not in and of itself, totally rule out brain damage would it?

A No.

Q That is just one tool that can be used, is that correct?

A Correct

Q Now, have you also seen tests that were performed on the Defendant again at the University of Texas Medical Branch in Galveston, within the last thirty to sixty days?

BY MR. SMITH:

Renew the prior objection to these tests, Your Honor.

BY THE COURT:

Alright. The objection is overruled. You can answer the question, Dr. Quijano.

[1647] A Yes, I have seen those results.

Q Was another EEG performed?

A Yes.

Q What did it show?

A The report indicates that EEG was normal.

Q Was the CT, or the Cat Scan performed?

A Yes, they were both performed and both reported normal.

Q And, the MRI?

A Yes, it was reported to be normal also.

Q Was he also given a genetic screen test of blood test that tested his chromosomes genetically?

A Yes, was given that in the sixties, and then again recently.

Q And, what did these tests reveal?

A Both showed that he was normal.

Q Physically, these tests showed no brain damage, would that be accurate?

A That's correct.

Q Based on the medical tests, as well as all of the other records that you have reviewed, Doctor, have you seen any evidence of actual brain damage?

A No.

Q Have you ever heard of brain damage to the entire [1648] cortex of the brain?

A Yes.

Q Do you see that possibility in this case?

A No, the person would be a vegetable.

Q Doctor, based on all of these records and your training and experience, what is your diagnostic impression with respect to the intellectual functioning of this Defendant at this time?

A Intellectually, he is between mild and borderline.

Q Would you, or do you have an opinion as to whether or not he is in fact, mentally retarded?

A Yes, I have an opinion.

Q What's your opinion?

A He is not mentally retarded.

Q And how did you arrive at that, even though, you just said that intellectually he is possibly mildly mentally retarded to borderline?

A Looking at the adaptive skills, the way that he has functioned and performed in a variety of settings, I judge that his adaptive skills, his survival skills are not in the retarded range.

Q With respect to his personality, have you formed any opinion as to any diagnosis in that area?

A Yes.

Q And, what is your opinion or diagnosis in that [1649] area?

A There is a pattern of grayness and the incident of rape, and the incident of anti-social behavior are also present. So, the other diagnostic impression would be anti-social personality disorder.

Q You mentioned rape. What does that mean?

A Well, there is another cateogory of mental disorders disorder that is called naraphilia, and a sub-category of that, so that he seems to have a problem in that area also.

Q Is that not necessarily a trait of the anti-social personality?

A No, not necessarily. It can be a part of it, but not a necessary part of it.

Q So, if I understand you correctly, your diagnosis would be that he is functioning intellectually within the mild mentally retarded to borderline area, is that correct?

A Yes.

Q But, in your opinion, because of his adaptive skills, from what you have seen throughout his records, that you feel that he is probably not actually, in fact, mentally retarded?

A That's correct.

[1650] Q But, he also suffers from an anti-social personality disorder?

BY MR. SMITH:

I would object to it, the witness has already testified and I would object.

BY THE COURT:

Overrule the objection.

Q That he also has an anti-social personality?

A Yes.

Q And, in addition to that, he has a sexual disorder that is evident by his raping conduct?

A Yes.

Q Talk about anti-social personality a little bit, Doctor. What is an anti-social personality?

A Anti-social personality has a number of components divided into two big chunks.

One is the behavior before sixteen, that there is a pattern of failure to follow rules and regulations before age sixteen as evidenced by inability to follow rules and regulations at home, in school, and frequent fighting, frequent violations of the rights of others, runaway, and involvement in the juvenile justice system.

[1651] After age eighteen, the pattern must continue and there should be evidence of, again, repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness without it, the person does not experience remorse and there are other measures of irresponsibility; inability to develop close personal relationships, inability to hold a job, the person quits his job before moving or before securing the next job. I mean, that, in itself, needs to be looked at.

Relating to the very richly person, gambling and different ways of endangering themselves, living on the edge, as it were. Those are some of the components, and if you see a pattern exsting that starts before age sixteen

and continues on, then, one could label a person anti-social personality disorder.

Q Your indicated one of the traits was that a person would not learn from the consequence of their act, is that correct?

A A person learns, they just – it gives an [1652] advantage, but, he does not learn from the punishment or from the cost.

Q Is it a common trait among habitual offenders, particularly violent offenders, that they have this personality trait, anti-social personality trait?

A Yes, the label is not given unless they have this repeated, and sometimes escalating offenses.

Q You mentioned cold bloodiness. One trait is that they show no remorse?

A No remorse, yes.

Q A person with an anti-social personality, that also had a history of violence, would you classify that person as a much dangerous individual?

A Yes.

Q Is there any cure for anti-social personality?

A No.

Q You mentioned sexual disorder or naraphilia. Are there different types of rapist? Categories of rapists?

A Yes, there are different types.

Q What are some of the types?

A One type is what you call the power rapist. This is a person who likes to dominate, just to over [1653] power another person, and in many cases, women are easily terminated, and to people who like to dominate and then, accomplish the domination by rape. There is the anger rapist, is a person that is very very angry and for some reson chooses to express that anger toward women; Or another type of rape, the rapes would be done on the same sex, and then, you have the saddist on top of the need to dominate, and express anger and they also inflict pain, and in the severe forms, obviously, rape, and murder.

Q A person that is a rapist, do they feel that the victim will comply with their demands initially or how do they feel?

A Yes. There is evidence and I have talked to a number of rapist, who believe that after the initial phase of coercion or threat of coercion, that the victim would fall for them.

Q Is a person that is classified with this type of sexual disorder, rapist, is that person a dangerous individual?

A Yes.

Q Is that a type of condition, one, that is likely [1654] to continue?

A Yes.

Q Based on your examination of all of these records and your prior training experience Doctor, do you have an opinion as to whether or not the Defendant in this case, Johnny Paul Penry, is dangerous?

A Yes, he is.

BY MR. SMITH:

Objection.

BY THE COURT:

Overrule the objection.

Q And, what was your opinion?

A I believe the Defendant, is dangerous.

Q With respect to his condition of being dangerous at this time, Doctor, have you – do you have an opinion as to whether or not he is likely to be dangerous and commit criminal acts of violence in the future?

A Yes, I do.

Q What is your opinion there?

A This opinion, intimation says that he is more likely to engage in continuing acts of violence in the future.

Q What do you base that on? If you could tell the [1655] jury some of the things.

A A number of things that I used to decide that, are help to decide the question.

One, is the presence or absence of disorders, mental disorders, in a person. In this particular case, there is evidence of anti-social personality disorder and there is evidence of sexual disorders paraphilia, the rapist. Those two things are very, very difficult to delete. So, that is one factor that I used.

Another one would be looking at the action of the person right after or right before the commission of the offense and there was some planning, thee was some forethought involved, That is more dangerous than an offense that is committed instantly or instantaneously, different from I was in a situation sort of sucked me into doing what I did. Planning and forethought is very dangerous. The actions of the person after the offense, that when a person was hurt, there was no attempt to help the person. If there was remorse, one would immediately try to help the person. There was none of that. In fact, you ought to look at not just the acts but the acts before and [1656] after, continuing on the line. You have evidence of a person that commits a crime like that, you have to look at whether there is a deliberate cover up. Now, do you go call the police and say I did it, or do you try to hide it, take your clothes away, or hide them or represent that you were somewhere else. There was some degree of cover up. Now, that is, to me, dangerous.

Then, you look at the condition of the person, a change, can a change be accomplished in a person and if the answer is yes, then, there is less likelihood, and if the answer is no, then, there is more likelihood. In this case I find that the person has not changed and will not change.

The condition is of the crime itself, was the crime, again, spontaneously or was it deliberate and if it was deliberate, so, what did you do anything about that. The crime was not specific to the circumstance, it originated not from the circumstances but, from inside him.

Those factors added together would lead me to believe that a person is more likely than [1657] not to become a continuing threat to society.

BY MR. PRICE:

Pass the witness.

BY THE COURT:

Okay. Lets recess for about ten minutes. Start back about ten-thirty. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:20 A.M. A TEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:45 A.M.)

BY THE COURT:

Dr. Quijano, you need to come back and take the witness stand.

BY MR. PRICE:

Judge, I need to ask Dr. Quijano one question that I neglected to ask him.

BY THE COURT:

Alright.

QUESTIONS BY MR. PRICE:

Q Dr. Quijano, the last question that I asked you pertained to the likelihood of this Defendant committing a criminal act of violence in the future, and you testified, to the various elements and basis that you arrived at the

opinion, and [1658] I want to specifically ask you, did you, in arriving at that opinion, rely upon your personal interview with the Defendant, back in May, to reach that opinion or conclusion?

A No, I did not.

Q Okay.

BY MR. PRICE:

I pass the witness.

BY THE COURT:

Mr. Smith?

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Dr. Quijano, you expressed an opinion in this Courtroom didn't you that Johnny Penry is not mentally retarded?

A From the data that I have, my opinion is that he is not mentally retarded.

Q And, you have been under oath in this proceeding before, haven't you?

A Yes.

Q And, you did not express that opinion the last time that you testified?

A I think I did.

Q That you gave that opinion the last time, that he was not mentally retarded?

[1659] A No.

Q You said that he was mild to borderline, didn't you?

A The intellectual functioning is in the mild/borderline range

Q That is what you said last time? And, you didn't say anything about his not being mentally retarded, did you?

A I was not asked, as I recall. I was not asked the question point blank.

Q You just let it go, intellectual function is mild borderline, you didn't have to mention that in your opinion, he wasn't mentally retarded, right?

A I was not asked and I did not answer.

Q Are you being cute, Doctor?

A I am not being cute, in the professional sense or in a scientific sense. I answer the questions that are asked to me.

Q When did you come up with the idea that you could make him not mentally retarded, by adding any adaptive behavior?

A That is required by State law.

Q But, you didn't mention it when you testified before?

A No, I ws not asked that question.

[1660] Q And, you recall, and you were called as a witness by Mr. Price, weren't you the last time?

A Yes, I was.

Q Did you discuss with him, did he even ask that question, that you had a flat opinion that the man was not mentally retarded?

A I discussed with him the components of mental retardation.

Q I just want to know, Doctor, whether you really thought last time that you were here that he wasn't mentally retarded? You never suggested that Mr. Price asked you the question?

A Did I think he was not mentally retarded? According to the criteria set forth, in the State law, is that he is not mentally retarded.

Q I am asking you the last time that you testified I am asking you if you had the same opinion then as you have now?

A Yes, I have, I had.

Q And, you are seriously telling us that it just never happened to come up the last time, correct?

A I was examined by two lawyers and the question never came up.

Q One of those lawyers was Mr. Joe Price, wasn't it?

[1661] A That's correct.

Q And, that question just never happened to come up when you were asked, right?

A I was not asked the question.

Q But, now, you are saying that even though, intellectually he is mild to borderline, he is not mentally retarded, because he adapted so well, is that your testimony?

A That his behavior and adaptive skills are not retarded, and thus, does not mean that he thinks less of the definition of mental retardation according to State law.

Q Are you telling this jury that Johnny Penry, is a wonderful example of how a mentally retarded person can adapt to society?

A No, he is not mentally retarded, so, he cannot be used as an example.

Q Are you telling this jury that Johnny Paul Penry is a wonderful example of how one of low intellectual function could adapt to society?

A No, he is not a wonderful example. He is an example.

Q Oh, he's not? Let me dwell for a minute on this mildly retarded borderline. Do you know a man name Fred Fason?

[1662] A No, I don't.

Q Never heard of him?

A Never.

Q He testified as an expert witness for the State in this case. You learning this for the first time?

A Oh, Fason? Yes, I mean, I have heard of him.

Q He said, that Johnny is in a range of mentally retarded to dull/normal. Lets say, that intellectually that you don't even go asfaras that, do you?

A Dull/normal is the eighties, and he is only up to the seventies, so, he is from the criteria, only a borderline.

Q And, if Dr. Fason said dull/normal, you would disagree, correct?

A From the figures that are available to me.

Q From the figures that are available to you, you would disagree, correct?

A Yes.

Q Now, those figures are available to you, those are the ones that are on the Exhibit Fourteen, written in such beautiful hand-writing, right?

A Yes.

Q And, you study as much as you have available to you about all of these tests, right?

[1663] A Yes.

Q And, do you have an opinion, Sir, as to any one of these tests, that is valid or is not valid?

A Each test has the varying degrees of validity.

Q Well, is there any test on there that you can tell this jury in your opinion as a scientist, is invalid?

A I cannot off-hand declare any of them invalid.

Q I'm not saying off-hand. You have been studying them for a while before you came here, haven't you?

A Yes, but, I was not there when those tests were administered.

Q And, without being there when they were administered you cannot say that they were either valid or invalid, correct?

A We can only be cautious in interpreting this.

Q Is a cautious way to interpret these tests, is throw out every result? Is that considered the cautious way to interpret it?

A No, the cautious way is to say the testing can go either higher or lower depending upon the Defendant's motivation at the point that the test was administered.

Q Higher or lower?

[1664] A Yes.

Q If Dr. Fason said they could only go lower, then, he would be wrong, wouldn't he, or if he said, they could only go higher, he would be wrong?

A Correct. They can go either way.

Q You did not personally give him an IQ test, did you?

A No, I did not.

Q Do you have an opinion on what Johnny Penry's IQ is today?

A From all of the test put together, he would be between mild and borderline.

Q Well, some of the tests are below mild, aren't they?

A Well, we are looking at his upper limits and not his lower limits. We are not trying to discover what his floor is, we are trying to discover what his ceiling is.

Q What is the highest overall IQ he ever tested at?

A 74.

Q Overall?

A Oh, you mean, full scale?

Q Full scale.

A On full scale, 63.

[1665] Q What is the lowest?

A 43.

Q 43. If you count this one, or if you don't count that one?

A It is 50.

Q Well, Doctor, less than 50, isn't it?

A Well, yes, it says less than 50.

Q What is 50, mild or moderate?

A Moderate.

Q You know Randy Price, don't you?

A Who?

Q Randy Price?

A Oh, Randy, yes.

Q And, he is a neuro-psychologist, isn't he?

A He is a clinical psychologist, yes.

Q Is he something called a neuro-psychologist?

A I am not aware that he is a neuro-psychologist.

Q You know him to be an honest, competent doctor, don't you?

A Yes.

Q And, if he said he was a neuro-psychologist, you would take his word for it?

A Yes.

Q And, if – and you know that he gave an IQ test to Johnny Penry a few months ago, right?

[1666] A Yes.

Q And, he was not – and you have not given Johnny Penry an IQ test?

A That's correct.

Q And, if Randy Price told you that these were his scores on an IQ test a few months ago, and that Randy Price had given the test, do you think that would be entitled to considerable weight, wouldn't you?

A No.

Q Why not?

A Because of the factor of malingering introduced by legal involvement, and I would not question that because Randy did it, I would question that done by anybody. Once the legal predicament is introduced, you have to view it very cautiously.

Q And, you said, malinering. That is another word for faking, isn't it?

A No, not necessarily. Malingering is when you not perform well, or perform worse or better for a secondary gain. In other words, you have some physical advantage, or some advantage to get, and faking sometimes you don't get anything out of it.

Q Is it fair to say that you are a very careful [1667] man about the works that you use?

A These are technical terms that you ought to be very careful with.

Q And, you are correct.

A Yes.

Q Okay. But, whether you call it malingering or faking, he is doing it on purpose, right?

A Faking sometimes is not done on purpose.

Q Okay. Okay. Malinger. By malinger, you mean doing bad on purpose, fair enough?

A Yes, yes.

Q Okay. And, are there ways to check on test whether someone is doing back on purpose?

A We can do our best, but, in the end, I don't think so. We, can have indirect measures, yes, that's correct.

Q Are you an expert in that particular field?

A I think so.

Q And, in the field of detecting malingering?

A Yes. I do that routinely in my applications.

Q And, so, you are familiar for example, with the Rayford fifteen item, then?

A That is one of the measures.

Q What is the Rayford fifteen item test?

A I don't use the test.

[1668] Q I just asked you what it was. I didn't ask you whether you used it. What is it?

A I am not familiar with that test. It is one of those things that measures malingering, but, I don't use it. There are better measures.

Q Doctor, I asked you a minute ago, are you familiar with the Rayford fifteen item, and the answer to that question is no, isn't it?

A I am not familiar with the test.

Q Is there any reason that you couldn't tell me that the first time that I asked the question? Is there a reason?

A I am not familiar with the test. I don't use it.

Q Do you know whether it is a particularly useful device in a Halstead Test, to see if a man is malingering or faking?

A That, I am not familiar with, either. I can say that there is other measures of malingering.

Q You are not familiar with it, but, you know better measures, right?

A Yes.

Q How can you say that they are better if you don't know what the other test is?

A Because there are more obvious measures for [1669] malingering than that test.

Q Tell us the obvious?

A Like when you – like when your life is at stake.

Q You say when a man's life is at stake, and it is malingering, and that is all that you need to know?

A No. When a person's gain is obvious, then, the guidelines say that you must be very cautious, because malingering creeps in, very obvious circumstances, when the person is not subjective as you would want them to be.

Q Doctor, no one disagrees that when a man's life is at stake, to be very cautious, but, you, right now, what do you do to be cautious? How do you test whether he is malingering or not?

A There are measures that you can use. Direct observation, for example.

Q Tell me two or three measures that you can use.

A One good measure is the MMPI, which was not administered. An MMPI would have told us whether it was a deliberate effort to test down, whether it was a deliberate effort to test up. You would have that. It also tells us whether he [1670] has anti-social features and anti-social, not normally to tell the truth. There are other measures, and that is direct observation. The way the questions are answered. The obvious contradictions in doing the examination process.

Q So, that if Randy Price told you that he had given four hours of test, and that he looked carefully for obvious contradictions and hadn't found any, would that indicate to you that maybe the man was not malingering?

A From his report, you have to, of course, give value to his impression, but, one also, has to give value to the overall instruction.

Q Doctor, try to address my question. If Randy Price said to you that he had given four hours of test, and that he had checked carfully to see if there were any inconsistencies in various parts of the test, and he had found it to be consistent all the way through, would that indicate to you that maybe the man was not malingering?

A Maybe, but, I have to question the mythology

Q What mythology do you use to check for malingering?

A I have to question – the point that I am trying to make is this –

[1671] Q Doctor, I didn't ask you the point that you are trying to make. Mr. Price can ask you point he is trying to make.

BY MR. PRICE:

He has got a right to explain his answer, Your Honor.

BY MR. SMITH:

I think I am entitled to ask the question.

BY THE COURT:

Go ahead and ask your question.

BY MR. PRICE:

He is entitled to answer.

BY THE COURT:

You can explain your answer, but, answer his question, Doctor.

Q You say you questioned Dr. Price's mythology the way that he tested for malingering, is that what you are saying here?

A No, I did not question what he did. I questioned what he did not do.

Q What did he not do, the MMPI, right?

A The MMPI. I do not see any consideration of the guidelines which tells us that the social, the predicament a person is in, has to be considered.

[1672] Q You say you have no evidence that Randy Price considered that at all, right?

A I have no evidence that he considered that because if he did, he would not be as categorical in his statement as he was.

Q So, you are telling this jury, that Randy Price didn't consider at all, the possibility of malingering, is that your opinion?

A Yes, because if he did, consider what he ought to consider, then, he would have been more cautious in saying that there is a possibility he did, or there is a possibility that he did not. In the end, he got an E or I to definitely determine a malingering, only the Defendant

can say that, but, the only thing is, there are guidelines that need to go by and one of the warnings that we are given to consider the circumstances of the person being tested.

Q Let me suggest to you some ways you can be cautious, okay? One way you can be cautious is you see what people usually – which parts of the test people usually like to malinger on, how he scores on it. Did you ever try that?

A Yes.

[1673] Q Do you know whether Randy Price did it this time?

A I don't know what Randy did.

Q I take it you haven't read or heard a summary of his testimony, have you?

A No, I haven't.

Q Another way you might test, you give him a chance to fake or malinger, to say I am going to give you a real hard test, but, actually, it is an easy one, and if he flunks it, that is a sign that he is faking, and if he does well that is a sign that he is not, does that make sense to you?

A Sometimes.

Q In fact, you have to be pretty smart to fake it convicingly on a four hour Halstead don't you, Doctor?

A If you did, yes, be very smart.

Q If a man faked a four hour Halstead, he would be very smart, right?

A Yes.

Q Do you have an opinion as to whether Johnny Penry is very smart?

A He is academically not very smart. He is street wise smart.

[1674] Q He is street wise smart?

A Yes.

Q And, is street wise smart a kind of skill that you need to fake on a Halstead?

A No it is a kind of skill you need to –

Q No, no, Doctor. Try my question, please. Is street wise smart the kind of smart that you need to fake the Halstead, yes or no?

A Yes.

Q It is?

A Yes.

Q So, that street wise smart person will know for example, that he had better do well on the finger tapping, but not do so well on the simulated drawing, street wise person knows that?

A Even simpler than that. Simply to say I don't know, simply to say I can't go on, simply to say I can do that. Who is there among us, no matter how good a psychologist is, to say that I don't know means I don't know, or I don't know, means I don't want to do it?

Q Very good point, Doctor. Is it true that when people are trying to malinger on a test, that the most

obvious way to do it is to say I can't do it, I don't know the answer, right?

[1675] A That is one way.

Q If Randy Price were to tell you that he tested this man four hours and not once did he give up on a single test and say he couldn't do it, would that indicate to you anything about his malingering?

A That statement is impossible to make, because how can I or Randy or anybody determine when he "Gives Up" and when he "Does Not Give Up"? Only he knows that.

Q When you determine a guy says I can't do it, can you say that?

A If he says I don't know or I don't want to, or I can't do it, that is one way to measure that variable.

Q And, if this particular Defendant never once said, I don't know, or I can't do it, what would that indicate to you?

A Not much.

Q The MMPI. That requires a sixth grade reading level doesn't it, Doctor?

A If it is read by the person being tested.

Q And, if it is read aloud of course that can achieve the results can't it?

A Not particularly to invalidate the test.

Q You have never actually given a Halstead?

[1676] A No.

Q But, you know what it is?

A Yes.

Q Well, list for us the test that make up the Halstead?

A I am not familiar with the specifics.

Q That's what you meant when you said you knew what a Halstead was?

A I know that the Halstead is a neuro-psychological battery made up of tests. Many of the tests, I am familiar. Some I am not familiar with. I do not use the Halstead, I use other measures.

Q The Halstead is widely recognized as a valid measure of brain damage, isn't it?

A Yes, is a very good test.

Q But, if I asked you to give me one right now you wouldn't know how, would you?

A No. If I had the instruments I could do it.

Q Well, I thought you couldn't even name the test that made it up?

A There is an instruction booklet with the Halstead test.

Q You could do it if you had the instruction book, right?

A Well, in many of those test, you have to read [1677] instructions, very basic. You cannot administer –

there are some tests without verbatim instruction. You have to have the instructions with you.

Q Let me just ask, have you ever read those instructions?

A During my training, but, I have not used them professionally.

Q Let me just test your recollection. How many tests in the Halstead?

A I don't know the exact number, ten or eleven.

Q How many can you name?

A The way – the MMPI, finger tapping, there are steps, I can tell you what we ought to measure but, not how to measure them.

Q I just asked how many you can name. You answered the question, Sir. Now, are you saying, Sir, that everyone who is below sub-average intelligence is mentally retarded?

A No.

Q You say that sub-average intelligence is one degree. You don't mean just sub-average, do you?

A You have the sub-average intelligence, plus [1678] adaptive skills.

Q Alright. Lets put aside the wonderful adaptive skills for a moment, and then, talk about intelligence. Okay? Are you saying that you can be mentally retarded in terms of intelligence just by the term, sub-average?

A Yes.

Q In other words, if my intelligence is below average, then, asfaras intelligence is concerned, I am mentally retarded?

A Yes, that is why it is called mild mentally retarded, and functioning at borderline, whatever level you are.

Q So, all of those types of people in the world are retarded in terms of intellect, right?

A I don't know where you got that statistic from.

Q You were using the word average differently. I have in mind a simple minded person, that if there are a hundred people in a room, fifty would be below average and fifty would be above. Is that what you mean by average?

A No, you are talking about a median.

Q What do you mean sub-average intelligence?

[1679] A Sub-average is 69 or below.

Q What percentage of the people in this country, or what you call sub-average intelligence?

A About one percent.

Q So, when you say sub-average, you mean that ninety of a hundred people are smarter than I am, if I am sub-average, right?

A Ninety-nine percent are smarter than you are? No, that's not what we are saying.

Q Okay. Lets try it again. One percent is mentally retarded, right?

A Yes.

Q Ninety-nine percent are not mentally retarded, right?

A The incident, –

Q Wait a minute, is that right or wrong?

A It is not – it is raising – you are stating it wrongly. The incident or mental retardation is one percent.

Q What is the incidence of not being mentally retarded?

A There is a difference between incident, which is the number of people that we have, and the number of people that we have tested, one percent appears to be mentally retarded, but, since we [1680] have not tested everbody in the world, we don't know the true count.

Q So, lets just stick to the ones that we have tested.

A Okay. One percent of those are mentally retarded.

Q Ninety-nine percent are not, right?

A Correct.

Q Do you have any reason to think that the rest of the world is different?

A Yes.

Q Well, okay. What about the rest of the world? The rest of the world, more than one percent or less than one percent are mentally retarded?

A We don't know, becuase that is a projection that we have not made.

Q The reason that you do these testings, is to try to figure out how common mental retardation is?

A Right. You try to make an educated guess.

Q And, your educated guess is one percent, right?

A Yes.

Q Okay. And, your educated guess, is that ninety-nine percent are not retarded, right?

A Yes.

Q Okay. And, so, that means, if I am mentally [1681] retarded, you are Dr. Quijano, your best educated guess, that ninety-nine percent of the people are smarter than I, right?

A That is a gross statement.

Q Now, – -

A Yes.

Q So, now, to be mildly mentally retarded, is a very serious impairment, is it not?

A No.

Q You wouldn't bother if you had a child that was mildly mentally retarded?

A I would bother, but, it is not a very serious impairment.

Q Well, would it bother you mildly or seriously?

A It would bother me seriously, but, the impairment it bothers emotional reaction to my child's problem would be severe, but, the child's problem is not severe.

Q What do you mean when you say that the problem of a mentally retarded person is not severe?

A The mild mentally retarded person's problem is not as severe, for example, as an anti-social personality disorder.

Q There are worse things than mental retardation, is that correct?

[1682] A That's correct.

Q Is severe child abuse one of them?

A Is severe child abuse worse than mental retardation? Yes.

Q And, if you get both, it is really quite a piece of bad lock, isn't it?

A Yes.

Q And, we don't know, what causes mental retardation, do we?

A Not specifically.

Q And, you listed a number of causes when you were testifying for Mr. Price, right?

A Yes, the possibility.

Q You didn't happen to mention brain impairment, Is that one of the possibilities?

A Brain impairment is caused by infection, trauma, some of the factors that I entered.

Q Brain impairment, caused by trauma, like a vicious beating around the head, that is one possibility?

A Not necessarily. You could be beat in the head without damaging the brain.

Q Could be, in fact, it would take a tremendous blow on the head to actually damage the brain, wouldn't it?

[1683] A That's correct.

Q And, such a blow, it would be unlike that, a mother would ever give that blow to a child, right?

A Or anybody for that matter.

Q But, it would be physically possible, I suppose, for a strong woman in a frenzy with a little child to give such a blow?

A It is possible.

Q Now, it is true, isn't it true that mentally retarded people are able to reason and plan and think things through less well than normal people?

A Yes.

Q And, it is true, that, that can be frustrating for mentally retarded people?

A Yes.

Q And, it is true sometimes more frustrating in a way if you are mildly retarded or borderline, isn't it? You see what I am getting at?

A No, I don't.

Q Sometimes it is a problem to be smart enough to understand how dumb you are, isn't it?

A Yes.

Q So that if you are bright enough to realize that [1684] ninety-nine percent of the people are smarter, that is particularly frustrating?

A Yes.

Q And, that kind of frustration, without saying that it is an excuse, or accounts for criminal conduct, is that kind of a frustration sometimes a contributing factor to criminal competence?

A It may or may not be.

Q Sometimes it is and sometimes the answer is yes?

A Sometimes the answer is no.

Q And, sometimes, one more time, is the answer sometimes yes?

A Sometimes yes, sometimes no.

Q It is also, a part from the frustration just not thinking things through, can itself sometimes contribute to criminal conduct, sometimes yes, sometimes no, right?

A In the anti-social, not thinking things through, is common, because – put it that way.

Q All I asked you was mentally retarded people, well, they have a problem thinking things through, don't they?

A Yes.

Q And, that problem, the question is, that problem sometimes contributes to criminal conduct? Is [1685] the answer sometimes yes, sometimes no?

A Yes.

Q It is also true, isn't it, that mentally retarded people like to appear normal?

A And, normal people, like to appear normal.

Q But, is it not a striking characteristic of mentally retarded people that they like to appear normal?

A Some of them do, and you know, the point is we cannot make categorical statements, that apply to everybody.

Q But, you are a little more argumentative today than you were when you testified a few months ago, aren't you?

A I respond to the circumstances.

Q Fair enough, Doctor. Let me ask if you testified this way when you were under oath on the 14th or 15th day of May this year.

"Question: Is it a known characteristic of mentally retarded people, even though it is a mild range, to have the desire to appear normal?" On Page 40. "Answer: That is true in most people in general, including, mentally retarded people, but, you don't have to be retarded to look better than you really are. That is what we do, that [1686] is why we wear clothing. Question: But, it is a striking characteristic that a lot of lay people aren't aware of about the mentally retarded, isn't it? Answer: Yes."

You gave that testimony, right

A Yes.

Q And, it was true, correct?

A Yes.

Q And, is it also true that mentally retarded people, generally respond to authority figures the way authority figures want them to respond?

A Generally, but it can go either way, again.

Q Now, you are very careful with words, Doctor, and I notice that when you mention the subject of anti-social personality disorder, you use the word diagnostic impression. You chose those words carefully, didn't you?

A Yes.

Q That is because you haven't actually made a diagnosis have you?

A That term, clinical impression, is a lead-way to the imprefection of our system, and although, knowing what we know, we arrive at that conclusion, we always, always, as a scientist, and as a professional, give some lead-way that there could [1687] be an error.

Q So, you are testifying that you never make a diagnosis, you just have a diagnostic impression?

A That's correct.

Q At the Competency Trial you did use the word diagnosis, you said you hadn't made one, correct?

A I, as a practice, just make diagnostic impressions. I am more humble than others, I guess.

Q Well, did you give the following testimony a couple of months ago? "Question: Do you really believe

Mr. Penry is anti-social personality? Answer: I have not definitely diagnosed him, I am going by previous evaluation." Did you give that testimony?

A Yes.

Q And, you said that, for anti-social personality disorder diagnosis, you have to have a lot of misconduct before the age of sixteen, right?

A Yes.

Q And, is that based on the diagnostic and statistical manual of mental disorders?

A Yes.

Q And, is this called the DSM3?

A Yes.

Q Did you check on the DSM3 before you come here [1688] today?

A Sure.

Q Would you want to check again and see if it says, sixteen or fifteen? Try Page 344.

A 344. Fifteen.

Q Fifteen. Okay. And, you relied on things in the record you saw that suggests that Johnny Penry was doing significant anti-social things before fifteen, correct?

A Yes.

Q And, do you know, Doctor, that all of that evidence came directly or indirectly from his mother?

A Some are from the school, some are from the institutions that he was in, it came from various sources.

Q But, when, the school just wants to know about a kid, who do they usually ask in your experience, Doctor?

A Their teachers, their classmates, their parents police records.

Q In this case, you don't have the slightest idea where this information came from that you saw in the records, do you?

A Yes, I have, some pretty good ideas, where they [1689] came from.

Q You don't think any of it came from his mother?

A No, I did not say that. I said some of the information came from various sources.

Q Tell me, which came from his mother and which didn't?

A Oh, the observations in school that he was taking sharpened pencils and poking girls with them.

Q Okay. Take that one out, please. Take that one out. have you got it there? Out of your folder. Have you got it there?

A I have to look for it. You want me to identify each time I see one?

Q Why don't you show me where you got that particular item, sharpened pencils?

A I haven't found it yet.

Q You haven't found it yet?

A No.

Q You keep on looking, then. Take your time. Can I give you a hint, Doctor? Try diagnostic evaluation dated July 29, 1965, by Dr. Noel Cowan, do you have that there?

A Is that UTMB?

Q I think so.

[1690] A Okay.

Q Got it there?

A Yes.

Q The item that you referred to is on the second page, isn't it, "Classroom, newly sharpened pencil."Right there.

A Dr. Cowan, right.

Q No, Dr. Noel Cowan. Let me show you a piece of paper. Looks like this.

A UTMB. I don't know if I can find it.

Q Look at my copy, okay?

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir.

Q See this before?

BY MR. PRICE:

What are you showing him, Counsel?

A It doesn't look familiar.

Q Has almost the exact words that you used in your testimony, doesn't it, "Stabbing girls in the classroom with a newly sharpened pencil?"

A I read it from a school report.

Q You did? Well, who is it? Were you shown the UTMB file or not?

[1691] A Yes.

Q Doctor, do me a favor. Look at my copy. Who are these? What does it say, informant, for UTMB report?

A Mrs. Shirley Penry.

Q Read the whole sentence please.

A "The informant was Mrs. John Shirley Penry, the mother."

Q Thank you. And, do you know whether his mother was mentally ill?

A She showed episodes from the records.

Q What records have you seen?

A Social history in a different institution.

Q Did you see the records of her hospitalization when Johnny was born?

A There was reference to the post-partum psychosis.

Q Did you see the hospital records from that post-partum psychosis?

A I don't think so.

Q Do you know whether or not she is a paranoid shizophrenic?

A No, only that she had a serious episode of mental illness.

Q Do you know if it shows violent episodes?

A There were references to that, yes.

[1692] Q Do you know whether she hated her child, Johnny?

A No, I do not know that for a fact.

Q You know whether she ever lied about him?

A I don't know whether she lied or not.

Q Do you have an opinion as to whether she is a reliable informant?

A No, I have no opinions.

Q Actually, when you did see Johnny Penry, you told him at that time, that you thought that he was a good person, even though he was accused of having been very bad, is that correct?

A Yes.

Q And, that is because as a psychologist and a christian, you sincerely believe that all of us are good, correct?

A Yes.

Q Are you an expert in determining whether children have been abused or not?

A Well, the abuse either happened or it didn't happen. You don't need an expert for that.

Q That is what the jury is for, right?

A Correct.

Q But, you said the first evidence was when he got in trouble when he was around seventeen, right?

[1693] A That is the first mention in the record.

Q Are you sure?

A No, I am not sure, but, that is what struck me when I was viewing the records.

Q And, you told the jury that, on your direct examination, did you tell them that you weren't sure?

A No, I didn't tell them I wasn't sure, because I was not asked.

Q Should they take all of your testimony that way, that if we don't ask you whether you are sure, we are going to assume that you are not sure?

A No, not necessarily. They should take my testimony as not sure if I am asked, and I say so.

Q Okay. So, we had better be careful to ask you the question if we want to know, right?

A Yes, and I would answer all questions.

Q Can you find an intake summary from the Mexia State School, dated July 16, 1968?

A Mexia. Okay. I got Mexia. Is that by the student case___worker?

Q Yes.

A Okay.

[1694] Q And, that is one of the documents that you relied on?

A Yes.

Q Read the last paragraph loud and clear, please?

A "A few days after admission, when subject's hair was cut, it was discovered that he had many more scars over his head. When asked how he received the scars, he said, that they were from cuts made by a large belt buckle which his mother used when whipping him."

Q Did you miss that when you went through the records?

A No.

Q That is before what you say was the first evidence of child abuse, isn't it?

A This is history. This is his report that this is the way that it happened.

Q You don't consider evidence of child abuse when a child tells this student case-worker he is abused?

A No, I don't take as truth everything that I read.

Q Only if it helps the party that called?

A No, only if it is selected for truth.

Q Isn't that what we have a jury for?

[1695] A That's correct.

Q Let me ask you to assume that there was some abuse that went on and I am going to give you some hypothetical facts and ask whether in your opinion that is abuse, okay? Assume a nine month old baby, sitting in a high chair is hit very hard with his mother's fist. Is that abuse?

A Yes.

Q Assume that a two year old child is scolded on purpose in the sink, been scarred. Is that abuse?

A Yes.

Q Assume that he is subjected to daily beatings with such things as extension cords and switches from a very early age, Is that abuse?

A Yes.

Q Assume he is locked in a room without access to toilet facilities and that is done clearly out of meanness. Is that abuse?

A Yes.

Q Assume that he is made to drink his own urine as punishment. Is that abuse?

A Yes.

Q Assume that he is made when he messed in his [1696] pants, he is made to eat it out of his pants, as punishment. Is that abuse?

A Yes.

Q Assume that when he get toys, his mother breaks them over his head. Is that abuse.

A Yes.

Q Assume that his mother's nickname for him is a Little Bastard, and that, it is said with hate. Is that a form of abuse?

A Yes.

Q Assume that his mother holds him under water in a bathtub, and screams that I am going to drown you, you little bastard. Is that abuse?

A Yes.

Q Assume that his mother takes after him with a butcher knife threatening to cut his penis off and he panics, terrifies the child, and thinks that she is really going to do it, and it takes the father to stop her. Is that abuse?

A Yes.

Q And, if you assume that this is true, and I realize you don't have any opinion one way or the other whether all of that is true, do you?

A Well, finish the question.

[1697] Q Do you have any opinion one way or the other on whether the things that I just said, my assumptions were true?

A No.

Q But, if you assumed that it was true then, that is one of the more appalling cases of child abuse that you have heard?

A Yes.

Q And, are you seriously saying that child abuse of that kind has nothing to do with later criminal acts?

A No, no, I did not say nothing. There is no causal effect. There are many people who are subjected to worse abuses who do not become rapist and murderers. There is no direct linkage. In fact, in many cases, people who are subjected to that kind of abuse go out of their way to do the opposite, and I am one of those.

Q I wouldn't ask you if you hadn't volunteered it, but, you had a very painful childhood, yourself?

A Yes.

Q Your father suffered from alcoholism?

A Yes.

Q And, don't answer this unless you want to Doctor, but, if you assume that everything I gave you as [1698] an assumption a little while ago, is absolutely true, did Johnny Penry have it even harder than you did?

A A close call.

Q And, you really went through stuff, I think?

A Yes. In fact, there are – I get – I can say that I had a worse life than him, in the end.

Q And, did you have any loving parents make it up to you?

A I think he was a loving father.

Q No, no, I am not asking you, Sir, I don't want to ask about your childhood, but, you volunteered. Did you have a loving parent?

A Yes.

Q Who was that?

A My father.

Q And loving mother?

A Yes.

Q And, I don't dispute all that you went through, but, that helped didn't it, those loving parents, they helped?

A They helped in two senses. The loving portion helped and the abuses made me very determined not to become like him.

Q If you assumed that Johnny Penry's mother hated [1699] him from the moment she saw him, that is lackened of abuse, you didn't have, isn't it?

A That's correct.

Q Are you really saying that, Doctor, that – you know about the horrible crime that occurred, don't you?

A You mean this offense?

Q This offense.

A Yes.

Q Diane Koch?

A Yes.

Q And, you really think those things would have happened exactly the same way if Johnny Penry had a loving mother like yours and mine?

A I could not say it wouldn't have happened, but, I can say this, because of his abuse that does not explain what happened.

Q Maybe we are shouting at each other, or I am shouting, but, you are not shouting back. Maybe we really agree. It is not an excuse, is it?

A Correct.

Q Had something to do with it?

A Correct.

Q And, over coming you terrible treatment, it was not easy for you, was it?

[1700] A No.

Q Even though, you did have two loving parents?

A That's correct.

Q And, you think it might have been harder if you were mentally retarded?

A Definitely.

BY MR. SMITH:

Pass the witness, Your Honor.

REDIRECT EXAMINATION

QUESTION BY MR. PRICE:

Q Dr. Quijano, were you furnished records from the Austin State Hospital?

A Yes.

Q I want to show you – you may can find in your records here, the intake summary, actually from Harris County, but, went to Austin State Hospital?

A Yes.

Q You see who the informants here are?

A The informants, Patsy Fuller, Lucille Anderson and Trudy Penry.

Q Okay. Doctor, I am going to ask you to assume that the evidence shows the Patsy Fuller and Lucille Anderson are the sisters of this Defendant's father. I am going to direct your attention over to the third page, second sentence [1701] in the last paragraph of that report. Would you read that to the jury, please?

A "He was hostile, he was quite hostile and aggressive with his peers, previously cutting and poking them with scissors."

Q And, that was based on information from Mrs. Fuller and Mrs. Anderson?

A That's correct.

Q And, that was not his mother, is that correct?

A That is correct.

Q And, didn't you review those records, Doctor?

A Yes.

Q And, Mr. Smith asked you about your personal situation, and I will be quite honest with you, I was not aware of that; but, he asked about whether or not it would be harder for you to have made the adjustment that you did; if you had been mentally retarded, and obviously, that would pose a problem in becoming a psychologist, the degrees that you have got, if you had been mentally retarded, that would keep you from, – oh, interfere with that, would it not?

A Correct.

Q Likewise, Doctor, if you had had a anti-social personality, or what use to be referred to as [1702] a psycho-path, would that have caused you some problems, also?

A That would be a more severe impediment than the mild retardation.

Q It would also be more indigitive of aggressive, violent behavior than mental retardation?

A Yes, that's correct.

BY MR. PRICE:

Nothing further.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down, Dr. Quijano. Okay. Lets recess early for lunch and then take the next witness. It is twenty minutes to twelve. You got a nother witness don't you Mr. Price?

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

Okay. Be more than fifteen or twenty minutes?

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

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